Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ERIKA ELAINE SIFRIT,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does due process prohibit a court from implying a material term in an unambiguous written agreement in which a criminal defendant bargains away her right against self-incrimination in consideration of the State's express and unequivocal agreement not to prosecute her for homicide?

2. Does due process prohibit a prosecutor from presenting inconsistent and irreconcilable material facts and theories in separately prosecuting two persons for committing the same offenses?

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Erika Elaine Sifrit petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The August 27, 2004 opinion of the Court of Appeals of Maryland is reported at 383 Md. 77, 857 A.2d 65, and is reproduced in the Appendix ("App.") at App. 1a-47a. The June 9, 2003 opinion of the Circuit Court for Frederick County, Maryland is unreported and is reproduced at App. 48a-49a. The September 30, 2002 opinion of the Circuit Court for Worcester County, Maryland is unreported and is reproduced at App. 50a-55a.

JURISDICTION

The opinion and judgment of the Court of Appeals of Maryland were entered on August 27, 2004. This petition is filed within 90 days of that judgment pursuant to Sup.Ct.R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. Statement of Facts.

On May 31, 2002, at approximately 12:30 a.m., Petitioner Erika Elaine Sifrit and her husband, Benjamin Sifrit, were arrested in the parking lot of a Hooters Restaurant and Bar merchandise store in Ocean City,

Maryland, as they were placing Hooters merchandise into the back of a Jeep Cherokee. (App. 5a.) The police searched the couple and found a 9 millimeter handgun and a knife on Mr. Sifrit, and a .357 magnum and a knife in Ms. Sifrit's possession. (*Id.*)

After Ms. Sifrit was arrested, handcuffed, and seated on a bench outside the restaurant, she told one of the police officers that she had anxiety problems and that she needed her medication, which she said was in a brown zippered pouch in her purse in the Jeep. (*Id.*) A police officer testified that he looked in the brown pouch but kept searching through the purse because he found only one of the pills that Ms. Sifrit described. (*Id.*) The officer opened other compartments within the purse, discovered several spent shell casings, and subsequently found identification cards that belonged to Martha M. Crutchley and Joshua Ford, who had previously been reported missing by the Fairfax City, Virginia police department. (App. 4a, 6a.)

Ms. Sifrit was brought to the police station and questioned about the whereabouts of Ms. Crutchley and Mr. Ford. (E. 251.)[1] Following several interrogations that took place over the next two days, Ms. Sifrit retained counsel, who, immediately after his first interview with her on June 2, 2002, entered into negotiations with the State's Attorney for Worcester County, Maryland. The product of those negotiations was a written Memorandum of Understanding (the "MOU") that the State's Attorney "personally typed." (E. 189.) In the MOU, the State agreed to not seek a sentence of death or life without parole against Ms. Sifrit, "[i]n exchange for reliable information from the Defendant to the State detailing the way and manner in which the

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1 All references to "E. __" are to the record extract filed in this case in the Court of Appeals.

bodies of Martha Margene Crutchley and Joshua Ford were packaged prior to disposal, as well as information on the location where the bodies were disposed of." (App. 56a.)

The MOU also expressly provided that Ms. Sifrit would subject herself to a polygraph examination, and that "[i]f Defendant tests 'not deceptive' on all material questions related to the homicides of the victims . . . asked of her by the polygraph examiner, and absent any compelling independent evidence to the contrary (*i.e.*, eye witness testimony, photographs and/or prospective reliable inculpatory statements by the Defendant) the State agrees not to prosecute Defendant for these homicide charges." (App. 56a-57a.) In return, Ms. Sifrit agreed to "cooperate with the State in the prosecution of Benjamin Sifrit, her husband, and further agrees to testify truthfully on behalf of the State at his trial," thereby waiving her Fifth Amendment right against self-incrimination. (App. 57a.) That cooperation included her agreement "not to invoke her marital privilege at the trial or any pretrial hearing of Benjamin Sifrit," and "to be interviewed by the State of Maryland as it prepares for the trial of Benjamin Sifrit." (*Id.*) The State reserved the right to prosecute Ms. Sifrit as an accessory after the fact to the homicides, and on any other non-homicide charges, including burglary and theft charges related to the Hooters break-in. (*Id.*)

Shortly after the MOU was executed, Ms. Sifrit provided critical information regarding the location of the bodies and the manner in which they were packaged that enabled the police to recover body parts of the victims. (App. 8a.) Without the victims' body parts, there was virtually no direct evidence of the homicides.

Ms. Sifrit was indicted on June 14, 2002 for multiple offenses, including the murders of Ms. Crutchley and Mr.

Ford. As part of her obligation under the MOU to cooperate with the State in the prosecution of her husband for murder, Ms. Sifrit was interviewed on June 24, 2002 by a detective and the State's Attorney, who questioned her for approximately five hours. Ms. Sifrit admitted that she was an active participant in the events that led to the murders and acknowledged that she did nothing to stop her husband or to report the crimes. She stated several times that she was downstairs in the condominium where the murders occurred when she heard a shot from upstairs, and was upstairs when Mr. Sifrit fired three more shots. (E. 54, T. 54-56; E. 56, T. 61-64; E. 58-59, T. 69-74.)

On July 23, 2002, Ms. Sifrit met with two United States Secret Service agents for the purpose of having a polygraph examination administered to her. As part of that examination, but before the polygraph equipment was activated, Ms. Sifrit was interviewed by the agents for 6½ hours. In the course of the interview, Ms. Sifrit provided a more extensive, but truthful, description of her role in the murders than she had previously given to the police and the State's Attorney. (App. 9a.) Following the interview, the agents briefed a Deputy State's Attorney about the statements that Ms. Sifrit had made to them. The Deputy State's Attorney subsequently terminated the polygraph examination. (*Id.*)

2. Proceedings Below.

After unsuccessfully attempting to persuade the State's Attorney to allow Ms. Sifrit to take the polygraph examination as required by the MOU, Ms. Sifrit's counsel filed a Motion to Enforce the MOU. The State opposed the motion, contending that the MOU contained the unwritten condition that Ms. Sifrit "was innocent" of the murders of Ms. Crutchley and Mr. Ford, and that Ms. Sifrit could not

meet that implicit condition because she made incriminating statements to the polygraph examiners indicating that she was involved in the homicides. (E. 192.) Following a hearing, the Circuit Court for Worcester County denied the Motion to Enforce the MOU. The trial court found that Ms. Sifrit had previously stated in the June 24 interview that "she is downstairs" during the entire time that the murders took place, and that she contradicted that statement in her July 23 interview with the polygraph examiners by making "prospective reliable inculpatory statements . . . that she was not downstairs just listening to the shots go off, but that she had a much more active role in it than she had told anybody, including her attorney." (App. 54a.)[2] The Circuit Court ruled that, in light of those statements, the Motion to Enforce the MOU should be denied because Ms. Sifrit "did not meet the [unwritten, implied] conditions precedent in the contract." (*Id.*) As a result, Ms. Sifrit was never afforded the opportunity to comply with the MOU by testing "'not deceptive' to all material questions" put to her by the polygraph examiners.

After Ms. Sifrit's case was transferred to the Circuit Court for Frederick County, but prior to her trial, the State prosecuted her husband for the murders of Ms. Crutchley and Mr. Ford in the Circuit Court for Montgomery County. In Benjamin Sifrit's trial, the State's Attorney argued to the jury that the murder weapon belonged to Mr. Sifrit and that Mr. Sifrit committed the murders. Stating that "[t]he murder weapon is the defendant's," the prosecutor

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2 Ms. Sifrit did not contradict herself. As discussed earlier, she explicitly informed the police and the State's Attorney in the June 24 interview that she was downstairs only when the first shot was fired upstairs, and that she was upstairs when her husband fired three more times.

summarized the State's case by telling the jury in his closing argument that the gun, a .357 magnum, "was purchased by the defendant" and "for the defendant," and that "the defendant signed a piece of paper saying that he was purchasing it for himself." (E. 111.) The State's Attorney also argued that Mr. Sifrit "confessed to the killing" (E. 116), and referred in his closing argument in Mr. Sifrit's trial to the testimony of Melisa Seling, whom the prosecutor described as "the best witness in the case" because "everybody else in this case . . . had been drinking, and Melissa had not." (E. 126.) Relying on Ms. Seling's testimony at two separate points in his closing argument, the State's Attorney emphasized that Mr. Sifrit told Ms. Seling, "[i]f you're ripping us off, I'll do the same to you as I did to that other couple" (E. 128), and that Mr. Sifrit "finally opened his heart up to Melissa, told the truth to her, 'I killed two people. I killed two people.'" (E. 165.)

At Ms. Sifrit's trial in Frederick County, the same prosecutor presented a version of who shot the victims that directly contradicted the factual theory the State had urged on the jury in Benjamin Sifrit's trial. In Mr. Sifrit's trial, the State contended that he shot the victims, arguing that Benjamin "fired three shots into" Mr. Ford and that "Erika pulls the trigger and misses." (E. 160.) In Ms. Sifrit's trial, the State reversed course and contended that "[t]he evidence is overwhelming that this Defendant [*i.e.*, Erika Sifrit] murdered these two people." (E. 263.) The State's Attorney stayed on this theme and, later in his closing argument, told the jury that Ms. Sifrit kept as souvenirs two bullets, "the mutilated bullet with flesh and blood from Joshua Ford, and a miss" (E. 278), because Ms. Sifrit "fired two of the shots" and "kept the two bullets that she fired." (E. 279.) Repeating to the jury that "she fired two of those shots, and that's why there were two bullets on that glass

top table for her souvenir collection," the State's Attorney argued, "[a]nd that means, ladies and gentlemen, that she shot one of the bullets into Joshua Ford and she shot a bullet at someone else which missed." (E. 296.) The State's Attorney made this completely contradictory assertion even though there was *no* evidence in *either* trial that Ms. Sifrit fired a gun at either victim. The State's argument that Ms. Sifrit did so was conjecture based entirely on the fact that the .357 magnum was in her possession when the couple was arrested at Hooters five days after the murders.

In stark conflict with his closing argument in Benjamin Sifrit's trial in Montgomery County that the murder weapon was purchased "by" and "for" Benjamin Sifrit and that Ms. Sifrit's possession of the gun when she was arrested "means nothing" (E. 111, 113), the State's Attorney also argued in Ms. Sifrit's trial that the gun "was purchased not for Benjamin Sifrit, but it was purchased for the defendant in this case" and "it was found on the defendant at the time of her arrest." (E. 276.) Thus, in Erika Sifrit's trial, the State's Attorney completely contradicted the factual theory he advanced when he prosecuted Benjamin Sifrit, and he did so by using the very same words in Ms. Sifrit's case that he used in Mr. Sifrit's trial to argue a totally inconsistent and irreconcilable factual theory. In each case, he told the jury that "[t]he murder weapon is the defendant's." (E. 111) (Benjamin Sifrit's trial); (E. 277) (Erika Sifrit's trial). In Mr. Sifrit's trial, the word "defendant" referred to him. In Ms. Sifrit's trial, the same word referred to her.

The State's Attorney also contradicted his own witnesses from the first trial by arguing in Ms. Sifrit's trial that Benjamin Sifrit did not commit the murders. In Mr. Sifrit's trial, the prosecutor attempted to link Mr. Sifrit to the murder weapon by pointing to Melissa Seling's testimony

that Mr. Sifrit "threatened" her with the .357 magnum, and telling the jury in his closing argument that Ms. Seling "told you that this is the gun he showed her that night." (E. 112.) But in Erika Sifrit's trial, the State's Attorney argued to the jury that Benjamin Sifrit did not threaten Ms. Seling with the murder weapon but rather used another gun, "the 9-millimeter." (E. 287-288.)

The manner in which the State's Attorney in Ms. Sifrit's trial dealt with the evidence of Benjamin Sifrit's confession to Melissa Seling also contradicted the position the State took in Mr. Sifrit's trial. At Mr. Sifrit's trial, the prosecutor emphasized Ms. Seling's testimony that Mr. Sifrit had said to her, "I killed two people." (E. 165.) Asking the jury in that case to disregard an out-of-court statement that Ms. Seling made to the police, in which she equivocated about whether Mr. Sifrit said "we" rather than "I" killed two people, the State's Attorney urged the jury to credit Ms. Seling's testimony in court, and not what she said elsewhere, because "Melissa told you the truth. Melissa was under oath today. She was not under oath when she talked to the police. There is no testimony or evidence that they placed her under oath when they questioned her." (E. 158.) At Erika Sifrit's trial, however, the State's Attorney argued just the opposite by disparaging Ms. Seling's sworn testimony, imploring the jury to credit her out-of-court statement to the police, and stating in his closing argument that the police officer who took that statement testified that he "asked her to clarify that, and then that's when she came back and said I killed, we killed, she killed, she wasn't sure." (E. 293.)

The State also impeached the testimony of another witness called on behalf of Ms. Sifrit, Michael McInnis, who had previously been called by the State in Benjamin

Sifrit's trial. In Mr. Sifrit's trial, the State's Attorney lauded the "truthfulness and veracity of Mr. Mc[I]nnis" (E. 115), who, as a witness for the State, testified that he had had a conversation with Mr. Sifrit some time prior to the murders in which Mr. Sifrit described how he would dispose of a person's body "[i]f I ever killed anybody." (E. 114.) Yet at Erika Sifrit's trial, after she called Mr. McInnis as a witness, the State sought to undermine the significance of Mr. McInnis' testimony by asking him on cross-examination whether his conversation with Mr. Sifrit was a "joke." (E. 267.) Thus, what was "important to point out" (E. 114) at Mr. Sifrit's trial became "an off-hand comment" (E. 270) when Ms. Sifrit was prosecuted.

Ms. Sifrit moved for a judgment of acquittal on the ground that the State's prosecution of her violated principles of due process and fundamental fairness because the prosecution advanced facts and theories that directly contradicted the facts and theories that the State offered at her husband's trial. Acknowledging that "[i]f he [the State's Attorney] had said to that jury in Montgomery County that only Benjamin did it, there may have been a due process argument," the Circuit Court nevertheless denied Ms. Sifrit's motion. (App. 49a.)

Ms. Sifrit was subsequently convicted of the first degree murder of Mr. Ford and the second degree murder of Ms. Crutchley, and was sentenced to life imprisonment and an additional 20 years to be served consecutively. (App. 12a.) By contrast, Benjamin Sifrit was acquitted of murdering Mr. Ford, and was sentenced to 30 years imprisonment for the second degree murder of Ms. Crutchley, and 5 years to run consecutively for being an accessory after the fact to Mr. Ford's murder. (*Id.*)

After Ms. Sifrit noted an appeal, the Court of Appeals of

Maryland granted a writ of certiorari on its own motion and, following briefing and argument, affirmed her convictions. The Court of Appeals did not dispute but rather acknowledged that the terms of the MOU are set forth in "the plain language of the agreement" and are "clear from the language of the agreement itself" (App. 13a), nor did the court dispute the State's Attorney's admission that the alleged "condition" that Ms. Sifrit not be involved in the murders is "not in the agreement." (E. 195.) The court nevertheless relied entirely on an alleged unwritten "implicit representation that she was not culpable in the murders" and held that "the State was no longer obligated to adhere to the agreement" because Ms. Sifrit made "'reliable inculpatory statements' as to her active participation in the murders." (App. 19a, 20a.) The Court of Appeals also rejected Ms. Sifrit's claim that the State violated her due process rights by presenting facts and theories that directly contradicted evidence and argument that the State offered in prosecuting her husband, stating that the State's "shifting position" did not give rise to a due process claim. (App. 39a.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to decide whether the Due Process Clause permits courts to imply a material term in an unambiguous written agreement in which a criminal defendant bargains away the right against self-incrimination in reliance on a prosecutor's express and unequivocal promises of more lenient treatment. This Court has held, in recognition of the fundamental principles of fairness that govern every plea agreement between the government and a criminal defendant, that such an agreement "implicates the Constitution," *Mabry v. Johnson*, 467 U.S. 504, 507-08 (1984), and that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can

be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). Although these and other decisions require courts to scrutinize strictly a defendant's waiver of constitutional rights, this Court has never squarely decided the important question whether the prosecution may repudiate its written and unambiguous promises on the basis of an implied term or condition. In the absence of such a decision, federal and state appellate courts have reached conflicting conclusions when determining whether the prosecution may use such a term or condition to avoid written commitments it has made in plea, immunity, and similar agreements in exchange for a defendant's cooperation and relinquishment of basic constitutional rights. This Court should review this case and hold, as the majority of the lower courts have, that a prosecutor is bound strictly by the express terms of such an agreement, and may not disavow an unequivocal written obligation by invoking alleged unwritten conditions that the defendant purportedly failed to satisfy.

Certiorari should also be granted to resolve a conflict between the Maryland Court of Appeals' decision and the decisions of other appellate courts over the important question whether principles of due process and fairness prohibit a prosecutor from presenting to two separate juries evidence and argument that advance two different and factually irreconcilable versions of how the same crimes were committed and which defendant committed them. After telling the jury in her husband's trial that Ms. Sifrit did *not* shoot Joshua Ford, the State's Attorney two months later told the jury in Ms. Sifrit's trial that she *did* shoot Mr. Ford. This factually irreconcilable conflict as to the most fundamental question concerning these murders rested on a whole series of other contradictions in the way the State

presented and argued the same evidence in the two trials, including using witnesses that the State called and vouched for in Benjamin Sifrit's case and then cross-examining and impeaching those same witnesses when Ms. Sifrit called them to present the same testimony in her case. The prosecutorial flip-flop at issue here is not unique to this case but rather is reflected in the increasing number of appellate court decisions addressing the propriety of this practice. Certiorari is warranted to decide whether it is "fundamentally unfair" "for a sovereign State represented by the same lawyer to take flatly inconsistent positions in two different cases." *Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, J., joined by Ginsburg, J., dissenting from denial of application for stay of execution).

I. THIS CASE PRESENTS THE IMPORTANT QUESTION WHETHER A MATERIAL TERM CAN BE IMPLIED IN AN UNAMBIGUOUS WRITTEN AGREEMENT IN WHICH A CRIMINAL DEFENDANT SURRENDERS CONSTITUTIONAL RIGHTS ON THE BASIS OF A PROSECUTOR'S EXPRESS PROMISES OF LENIENCY.

Review is warranted because the unsound rule announced by the Court of Appeals of Maryland gives unprecedented approval to a prosecutor's disregard of his unequivocal written commitments at the expense of individual rights and public confidence in the fair administration of justice. Notwithstanding the appellate court's explicit recognition that the written agreement at issue in this case is "plain" and "clear" (App. 13a) and does not contain any express condition that Ms. Sifrit had to establish her innocence in a polygraph examination to avoid prosecution, the court below held that the State of Maryland was not bound by the written agreement it made with Ms.

Sifrit because she could not satisfy the "implicit" condition that she was not involved in the murders. (App. 19a.) Permitting the prosecutor in this case to unilaterally repudiate the written undertakings that he gave to induce Ms. Sifrit to provide important information about the murders, and to relinquish the fundamental constitutional right against self-incrimination, contravenes basic principles of "fairness" that "presuppose" every agreement "between an accused and a prosecutor" that results in such a surrender of rights. *Santobello v. New York*, 404 U.S. at 261.

"It was error for the Court of Appeals to imply as a matter of law a term which the parties themselves did not agree upon." *United States v. Benchimol*, 471 U.S. 453, 456 (1985) (per curiam). The State and Ms. Sifrit reduced to writing all of the terms that they agreed upon, none of which included the condition that Ms. Sifrit had to establish her innocence to avoid prosecution. To the contrary, the State explicitly agreed that it would not prosecute Ms. Sifrit for homicide if she tested "'not deceptive' on all material questions related to the homicides of the victims . . . asked of her by the polygraph examiner," subject to one condition only: that there could be no "compelling independent evidence to the contrary (*i.e.*, eye witness testimony, photographs and/or prospective reliable inculpatory statements by the Defendant)." (App. 56a-57a.) In other words, the State expressly promised Ms. Sifrit that if she were to test "not deceptive" in answering the polygraph examiner's questions, the State could prosecute Ms. Sifrit for murder only if "independent" "prospective reliable inculpatory statements" – or some other kind of evidence – were "to the contrary" of what she said during the examination and thus constituted "compelling" proof that her answers were, in fact, deceptive. The State breached its agreement with Ms. Sifrit by prosecuting her for homicide

without even giving her the opportunity to take the polygraph examination and test "not deceptive." In the absence of such a polygraph test result, there could be no evidence to the contrary of *any* kind.

In light of Ms. Sifrit's waiver of her constitutional rights and the significant benefits that the State received from the MOU before repudiating it, the State is bound by the written agreement. Conceding that it would have been very difficult to successfully prosecute *anyone* for the murders of Ms. Crutchley and Mr. Ford if the police could not find their bodies, the State's Attorney also testified that he expected Ms. Sifrit's cooperation would greatly enhance the likelihood of successfully prosecuting Benjamin Sifrit for the murders.[3] Those two concerns were expressly reflected in the MOU, which is silent on the issue of the degree of Ms. Sifrit's purported participation in the murders. But after having obtained the information he needed from Ms. Sifrit, the State's Attorney wrongfully deprived her of the opportunity to do what the State agreed it would allow her to do to avoid murder charges – test "not deceptive" on a polygraph examination.

Although this Court has never addressed the applicability of the Due Process Clause in this specific context, the rationale of its prior decisions mandates reversal of the court below. *Santobello v. New York* did not decide whether "the interests of justice" that require a prosecutor to fulfill promises made in a plea agreement also prohibit the State from relying on implied terms when the agreement is reduced to writing, but the Court in that case made clear that, regardless of the particular facts, this phase

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3 Indeed, Mr. Sifrit was acquitted of most of the charges filed against him when the State tried him without the benefit of Ms. Sifrit's testimony.

of the criminal process "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." 404 U.S. at 262. In *United States v. Benchimol*, the Court concluded that those circumstances are strictly defined by the agreement itself, and held that the government is not bound by an "implied" plea bargain term that it did not "in fact agree to." 471 U.S. at 455. That holding is impossible to reconcile with the Maryland Court of Appeals' decision in this case that the government may, nevertheless, invoke such a term to disavow express promises it has made in exchange for a defendant's agreement to cooperate and to waive her constitutional rights.

The lower court's decision that such an agreement can be amended by an "implicit representation" also conflicts with the settled principle that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). This Court has recognized that a plea can "be challenged under the Due Process Clause" "when it develops that the defendant was not fairly apprised of its consequences." *Mabry v. Johnson*, 467 U.S. at 509. The State's act of repudiating its written promises to Petitioner, due to her purported failure to establish her innocence, violated any reasonable "understanding of the consequences" of her agreement with the prosecution, *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (quoting *Kercheval v. United States*, 274 U.S. 220, 223 (1927)), which expressly and unambiguously provided that the State could prosecute Ms. Sifrit for murder only if it discovered evidence that was "contrary" to "not deceptive" answers in a polygraph examination that the State never allowed Ms. Sifrit to take.

Contrary to the holding of the court below, this Court's decisions require that Ms. Sifrit's waiver of her constitutional rights must be governed by the terms that she and the State memorialized in writing to create a record of their agreement, and not, as the Maryland Court of Appeals concluded, by an alleged oral "conversation between the State's Attorney and Erika's then attorney." (App. 16a.) Otherwise, the unseemly contest of credibility that occurred in the case between the State's Attorney and Ms. Sifrit's counsel over a purported unwritten term of the MOU will become commonplace. The interpretation and construction of plea agreements should not turn on the vagary of credibility and the fallibility of memory.

In conflict with the Maryland Court of Appeals' decision, but in recognition of the important constitutional rights that are implicated when a criminal defendant enters into a plea or similar agreement on the basis of a prosecutor's written promises, a number of federal and state appellate courts have held that the government's obligations are defined by "the express language used in the agreement," *United States v. Brye*, 146 F.3d 1207, 1210 (10th Cir.1998), and that the government is "strictly bound" by "the literal terms of the agreement." *United States v. Grimm*, 170 F.3d 760, 763 (7th Cir.1999). These and other courts have routinely held that due process requires that the government adhere to the written terms of any plea bargain or immunity agreement it makes, and that the government cannot "avoid its obligations under the express terms of the . . . agreement," *United States v. Laday*, 56 F.3d 24, 26 (5th Cir.1995), "unless there is an express limitation to the contrary," *United States v. Gebbie*, 294 F.3d 540, 547 (3rd Cir.2002), or "the Government's obligation is otherwise qualified . . . – a thing quite easily done." *United States v. Thournout*, 100 F.3d 590, 595 (8th Cir.1996) (quoting

United States v. Harvey, 791 F.2d 294, 303 (4th Cir.1986)). *See also United States v. Baker*, 25 F.3d 1452, 1458 (9th Cir.1994) ("In interpreting plea agreements, 'the government is to be held to the literal terms of the agreement, and ordinarily must bear responsibility for any lack of clarity.'") (citation omitted).

The Maryland Court of Appeals' reliance on an "implicit" term to conclude that the State of Maryland had the right to repudiate its unambiguous written promises to Petitioner conflicts with the decisions of these and other courts, the majority of which have held that, when the language of a plea agreement is "perfectly plain and capable of legal construction, . . . it is error for a court 'to imply as a matter of law a term which the parties themselves did not agree upon.'" *Baughman v. State*, 430 S.E.2d 505, 506 (S.C.), *cert. denied*, 510 U.S. 991 (1993) (quoting *United States v. Benchimol*, 471 U.S. at 456) (other quotations and citation omitted). *See also State v. Wills*, 765 P.2d 1114, 1120 (Kan. 1988) ("[T]he State's promise to make favorable sentence recommendations binds the state at the subsequent hearing on the defendant's motion to modify sentence, absent language in the plea agreement limiting the State's promise."); *White v. United States*, 425 A.2d 616, 620 (D.C. 1980) (holding that the government breached its agreement when it "failed in its duty to comply strictly with the terms").

In rejecting the strict interpretation approach applied in these cases in favor of a rule that permits the State to unilaterally change the terms of its written agreement with Ms. Sifrit, the court below follows a minority of courts which have held that the prosecution's promises in an unambiguous plea agreement may be qualified by implicit terms. *See, e.g., United States v. Annabi*, 771 F.2d 670, 672

(2nd Cir.1985) (holding that a plea agreement that uses the term "the Government" "binds only the office of the United States Attorney for the district in which the plea is entered unless it affirmatively appears that the agreement contemplates a broader restriction"). That rule should be reviewed and reversed because it is in sharp conflict with this Court's decisions, the decisions of other appellate courts, and the basic rule of fairness that applies when the government makes promises that induce an individual to surrender important constitutional rights.

II. THIS CASE PRESENTS THE IMPORTANT QUESTION WHETHER DUE PROCESS FORBIDS A STATE FROM USING DIRECTLY CONFLICTING FACTUAL THEORIES IN PROSECUTING DIFFERENT DEFENDANTS IN SEPARATE TRIALS FOR THE SAME CRIMES.

Certiorari should also be granted to resolve a conflict between the decision below and other appellate courts over the important question whether the prosecution violates due process when it presents inconsistent and irreconcilable factual theories in separately prosecuting two or more defendants for the same offenses. Depending on which case it was, the same prosecutor argued that Petitioner's husband was solely responsible for shooting Joshua Ford and that Ms. Sifrit did *not* shoot him (E. 160), or that Ms. Sifrit *did* shoot Mr. Ford. (E. 279, 296-97.) Despite this directly conflicting version of which defendant committed the murders, the court below held that there was "no inconsistency in the State's position sufficient to justify concluding that a due process violation occurred." (App. 38a.) Review is warranted because the Court of Appeals of Maryland not only decided an "important question of

federal law that has not been, but should be settled by this Court," Sup. Ct. Rule 10(c), but it did so "in a way that conflicts with the decision of another . . . court of appeals," *id.*, Rule 10(b), *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir.2004), in which the Sixth Circuit held that "the state clearly used inconsistent, irreconcilable theories" in violation of due process when, "[a]t each proceeding, the prosecutor argued that the defendant had been the one to pull the trigger." *Id.* at 613.

This Court should resolve this conflict and decide the "serious questions" that "are raised 'when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens.'" *Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, J., joined by Ginsburg, J., dissenting from order denying application for stay of execution) (quoting *United States v. Powers*, 467 F.2d 1089, 1097 (7th Cir.1972) (Stevens, J., dissenting), *cert. denied*, 410 U.S. 983 (1973)). Emphasizing the Constitution's "overriding concern with the justice of the finding of guilt," *United States v. Agurs*, 427 U.S. 97, 112 (1976), this Court has stated that it is as much a prosecutor's "duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds*, *Stirone v. United States*, 361 U.S. 212 (1960). That duty flows from the Due Process Clause, which imposes unique responsibilities on prosecutors, such as the duty to "disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial," *United States v. Bagley*, 473 U.S. 667, 675 (1985), and the obligation to ensure that "criminal trials are fair; our system of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Recognizing the special role that prosecutors fulfill in the criminal justice system, the Sixth Circuit and other federal appellate courts have held that, although prosecutors are not expected to try in precisely the same way two cases involving different defendants accused of committing the same crimes, it is fundamentally unfair for the same prosecutor to present to two separate juries evidence and argument that advance two different and irreconcilable versions of how the crimes were committed and who committed them. Noting that the prosecutor "manipulated evidence and witnesses, argued inconsistent motives, and at [one defendant's] trial essentially ridiculed the theory he had used to obtain a conviction and death sentence at [the other's] trial," the Ninth Circuit has held that "when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." *Thompson v. Calderon*, 120 F.3d 1045, 1057, 1058 (9th Cir.1997) (en banc), *rev'd on other grounds*, 523 U.S. 538 (1998)). Similarly, stating that "what the State claimed to be true in [one defendant's] case it rejected in [the other's] case, and vice versa," the Eighth Circuit has held that "the use of inherently factually contradictory theories violates the principles of due process." *Smith v. Groose*, 205 F.3d 1045, 1050, 1052 (8th Cir.), *cert. denied*, 531 U.S. 985 (2000). "Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth." *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir.1985) (Clark, J., specially concurring), *cert. denied*, 478 U.S. 1020 (1986).

Ms. Sifrit's due process rights were violated because the State manipulated evidence and witnesses, argued inconsistent material facts, and so strongly advanced a contradictory theory of her guilt that one can only guess

what the jury would have done if the State had acknowledged in her case what it expressly stated in her husband's, namely, that she did not shoot anyone. Ms. Sifrit either shot Joshua Ford (E. 296) or she did not (E. 160), but she could not do both. Ms. Sifrit's possession of the murder weapon at the time of her arrest either "means nothing" (E. 113) or is evidence of her guilt (E. 276), but it does not mean both. Benjamin Sifrit either "threatened" Melissa Seling with the murder weapon (E. 112) or he "never threatened" her with that gun (E. 304), but he could not do both. He either told Ms. Seling that he was the killer (E. 165), or he did not say that. (E. 293.) Another witness' testimony is either "important" (E. 114) or a "joke" (E. 267), but it cannot be both.

The prosecutor's "deliberate deception" is "incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). The Court of Appeals of Maryland concluded that the government's actions constituted mere "differences in emphasis and inferences regarding certain facts tending to show the guilt of the defendant currently on trial" (App. 35a), but other appellate courts have held that less egregious examples of prosecutorial abuse that, as in this case, existed "at the core of the prosecutor's cases against defendants for the same crime," *Smith v. Groose*, 205 F.3d at 1052, "infected the conflicting prosecutions" and resulted in a "due process deprivation." *Thompson v. Calderon*, 120 F.3d at 1059. The State violated Ms. Sifrit's due process rights because, as in those cases, there is a "reasonable probability" that the outcome of this case would have been different "had the prosecution not pursued conflicting theories concerning who was the actual shooter." *Stumpf v. Mitchell*, 367 F.3d at 616.

If the State tried this case in a manner consistent – rather than flatly inconsistent – with its factual theory in Mr. Sifrit's trial in which the State portrayed Mr. Sifrit as a "trained killer" (E. 115) who "purchased" (E. 111) the murder weapon, "threatened" (E. 112) Ms. Seling with it, told her that "I killed two people" (E. 165), and single-handedly murdered both victims, the jury may well have viewed quite differently the State's argument that Ms. Sifrit should be found guilty because the Sifrits allegedly worked "as a team." (App. 42a.) This Court should grant certiorari and reverse the Maryland Court of Appeals' decision because "[t]he state cannot divide and conquer in this manner." *Drake v. Kemp*, 762 F.2d at 1479 (Clark, J., specially concurring).

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland. Following review, the judgment should be reversed.

Respectfully submitted,

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IN THE COURT OF APPEALS OF MARYLAND

No. 139

September Term, 2003

ERIKA ELAINE SIFRIT

v.

STATE OF MARYLAND

Bell, C.J.
Raker
Wilner
Cathell
Harrell
Battaglia
Greene,

JJ.

Opinion by Greene, J.

Filed: August 27, 2004

A jury in the Circuit Court for Frederick County, on June 10, 2003, convicted Erika Sifrit ("Erika"), of first degree murder, second degree murder, and various theft charges.[1] Erika's convictions and this appeal arise out of events that occurred over the Memorial Day weekend 2002 in Ocean City, Maryland, resulting principally in the death of two people, Martha Crutchley and Joshua Ford.[2]

In a related case, a separate jury in the Circuit Court for Montgomery County, on April 9, 2003, convicted Benjamin Sifrit ("Benjamin"),[3] Erika's husband, of second degree murder and first degree assault of Martha Crutchley and accessory after the fact for the murders of both Ms. Crutchley and Mr. Ford. We granted Erika Sifrit's petition for writ of certiorari. *Sifrit v. State*, 380 Md. 230 (2003). Subsequently, while Benjamin's appeal was pending in the Court of Special Appeals, we granted his petition for writ of certiorari before consideration of his claims by the intermediate appellate court. *Sifrit v. State*, 381 Md. 324 (2004). Even though, many of the facts, issues and legal arguments in these two cases overlap we answer the issues and contentions of the parties in separate opinions of this Court.

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[1] Erika was also tried and convicted of burglary related to the break-in at Hooters.

[2] Due to extensive pretrial publicity Erika's case was removed from the Circuit Court for Worcester County and transferred to the Circuit Court for Frederick County.

[3] Benjamin is referred to by a number of witnesses by his nickname, B.J. When we quote the witnesses we shall also use the nickname.

Erika raises a number of issues on appeal:

1. Whether the State failed to comply with the express terms of the Memorandum of Understanding where the State agreed not to prosecute Erika for murder if certain conditions were met.

2. Whether the State violated fundamental principles of fairness and due process by presenting two directly conflicting factual theories in separate trials of Erika and her husband, Benjamin, both of whom were charged with committing the same crimes.

3. Whether the police conducted an unlawful search of Erika's purse.

We shall affirm Erika's convictions. Based on the language of the pre-trial Memorandum of Understanding, entered into by Erika and the State, Erika represented that she had not participated in the murders, and she breached the agreement by thereafter making "prospective reliable inculpatory statements." In light of her breach, the State was not required to honor its obligations pursuant to the agreement. Secondly, a due process violation does not exist in a situation involving multiple trials based upon a single criminal transaction, unless the prosecution presents inconsistent theories and the inconsistency exists at the core, rather than the margins, of the State's case. It is not enough for us to find a due process violation that there are discrepancies because of rational inferences drawn from ambiguous evidence, provided the multiple theories are supported by consistent underlying facts. In the present case, the State's theory that Benjamin and Erika committed the criminal offenses together as a team remained consistent throughout both trials. Any inconsistency in inferences or emphasis placed on particular facts by the State was consistent with the

State's underlying theory of the case and did not violate Erika's right to due process. Lastly, the search of Erika's purse did not violate the Fourth Amendment. The proper scope of Erika's consent encompassed all areas in her purse where the requested medication could have been contained.

I.

On Friday, May 24, 2002, Martha Crutchley and her boyfriend, Joshua Ford, drove from Virginia to Ocean City, Maryland, for the Memorial Day weekend. Erika and her husband Benjamin were also vacationing in Ocean City over the holiday weekend. On Saturday night, May 25, 2002, the Sifrits met Ms. Crutchley and Mr. Ford on a bus on their way to Seacrets, a popular Ocean City nightclub. The Sifrits did not have the exact change for the fare so Ms. Crutchley and Mr. Ford offered to pay the Sifrits' fare if they would buy them a drink when they arrived at Seacrets. The foursome and two other people from the bus, friends Anne Carlino and Jeff Hysee, spent the rest of the evening together at Seacrets.

What happened in the early morning hours following the night at Seacrets is unknown. We do know, however, that at 3:00 a.m. on Sunday morning, May 26, 2002, Erika called 911 claiming that people she did not know were in her condominium unit and she could not find her purse. She was "afraid I'm going to have a robbery here." The call abruptly ended and no one was dispatched to the condominium.

On Tuesday, May 28, 2002, one of Ms. Crutchley's co-workers notified the Fairfax City police that Martha Crutchley failed to show up at work following the Memorial Day weekend. Fairfax City police contacted the Ocean City police who found Ms. Crutchley's car outside the condominium where she and

Mr. Ford were staying for the weekend. The police found the couple's belongings left in their condominium as if they had just stepped out. Concerned about Ms. Crutchley and Mr. Ford, the police began to search actively for them.

On May 31, 2002, around midnight, the Ocean City Police Department responded to an alarm call from the closed-for-the-night Hooters Restaurant and Bar merchandise store on 122nd Street in Ocean City. There they found Erika and Benjamin loading Hooters merchandise into their Jeep Cherokee. The couple were placed in handcuffs. Upon searching the couple, the police found a 9 millimeter handgun and a knife on Benjamin and a fully-loaded .357 magnum revolver tucked into Erika's blue jeans in the small of her back. Another knife was found on Erika. Discovered in the Sifrits' car were a .45 caliber gun, ski masks, flex cuffs, and tape.[4] The two were arrested and charged with burglary.

At the scene of the burglary, Erika told the officers that she had anxiety problems and that she needed her Xanax and Paxil from a brown leather pouch in her purse located in the front of the Jeep. One of the police officers, Sgt. Beene, looked in Erika's purse for the pills. He found only one type of the pill inside the brown leather pouch. Sgt. Beene continued to look for the other type of pill inside a red pouch because he noticed medicine bottles in that pouch. When the officer did not find the second type of pill in the red pouch he looked in a zippered pouch in the back of the purse. There he

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[4] Investigators later found other items in the Jeep including but not limited to a knife, gloves, and undeveloped film.

discovered four spent .357 magnum shell casings and one live round. The sergeant continued to look for the second pill in a gray change purse, also inside Erika's purse, and found the identification cards of Mr. Ford and Ms. Crutchley.[5] Fearing for the safety of Ms. Crutchley and Mr. Ford, the police ordered an i.nmediate search of the Sifrits' condominium.

Upon entering the Sifrits' condominium, the police observed photographs and two bullets on a glass table. The pictures were of the Sifrits, Ms. Crutchley, and Mr. Ford, taken before the murders. Both of the bullets on the table had been fired from the .357 magnum recovered from Erika at Hooters, and one of the bullets had Mr. Ford's blood and tissue on it. Police also found a key to Ms. Crutchley and Mr. Ford's condominium on another table. Crime scene technicians found bloodstains in the Sifrits' master bathroom on the top of the counter, the underside of the counter top, the floor, the floor under the vanity, the back side of the bottom drawer of the vanity, under the mirror, under the baseboard, under the hot tub faucet, on the hot tub step, on a sailboat candle holder on the hot tub, on the window, and in the shower. Swabs were taken from these bloodstains, which were all later identified as matching the DNA of either Ms. Crutchley or Mr. Ford. There was also a hole in the back wall of

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[5] There was also a silver ring with a dragon engraving found in Erika's purse that was later identified as belonging to Mr. Ford. DNA testing revealed blood from both Joshua Ford and Martha Crutchley on the ring. Ms. Crutchley was a major contributor to the DNA sample found on the ring and Mr. Ford was a minor contributor, according to a forensic chemist for the State of Maryland.

the bathroom, fresh paint on the wall, and numerous cleaning supplies on the floor next to the bathroom door. The cleaning supplies, it was later discovered, had been purchased on Sunday, May 26, 2002, the day after Martha Crutchley and Joshua Ford were murdered.

Later, at the police station, Erika agreed to take Detective Bernal to where she claimed the bodies of Martha Crutchley and Joshua Ford were located. Erika directed Det. Bernal to two dumpsters located behind grocery stores in Rehoboth Beach, Delaware. Other officers went to the stores to check the dumpsters, but did not find the bodies. While Detective Bernal traveled with Erika to the places where she claimed he could find the bodies, she told the detective that her husband, Benjamin, had shot Mr. Ford and Ms. Crutchley, "cut their bodies into pieces" and "put them in garbage bags."

On June 2, 2002, Erika's then attorney, Arcangelo Tuminelli, entered into negotiations with Joel Todd, the State's Attorney for Worcester County, regarding the charges against Erika. A Memorandum of Understanding (MOU) came out of those negotiations. The MOU stated that Erika agreed to "cooperate with the State in the prosecution of Benjamin, her husband, and further agrees to testify truthfully on behalf of the State at his trial." The MOU provided that the State would not seek a sentence of death or life without parole against Erika as long as she provided reliable information to the State ". . . detailing the way and manner in which the bodies of Martha Margene Crutchley and Joshua Ford were packaged prior to disposal, as well as information on the location where the bodies were disposed of." The MOU also provided that if Erika took a polygraph examination and if she tested ". . . 'not deceptive' on all material questions related to the homicides of the victims . . ." then the State would not prosecute Erika for the homicide

charges.[6] The exact language of the relevant portion of the MOU is as follows:

> Additionally, Defendant agrees to subject herself to a polygraph examination to be conducted by an active federal polygraph examiner, said examiner to be agreed upon by the State and Defendant. If Defendant tests "not deceptive" on all material questions related to the homicides of the victims referenced in Paragraph 1 above asked of her by the polygraph examiner, and absent any compelling independent evidence to the contrary (*i.e.* eye witness testimony, photographs and/or prospective reliable inculpatory statements by the Defendant) the State agrees not to prosecute Defendant for these homicide charges.

After the MOU was executed, Erika told Detective Bernal that most of Joshua Ford's and Martha Crutchley's body parts were in black garbage bags that Benjamin had packed into Navy kit bags before throwing in a dumpster. Erika told the detective that she helped Benjamin throw the bags containing the body parts in a dumpster behind a Food Lion grocery store. The Food Lion dumpster was located across the street from the dumpster that Erika had previously directed the detective to search. After searching the landfill where the contents of the Food Lion dumpster had been emptied, police recovered body parts of Mr. Ford and Ms. Crutchley. Police recovered only the left leg of Ms. Crutchley. Thus, her cause of death was never determined. Police

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[6] Erika never took the polygraph examination.

recovered the torso and both arms of Mr. Ford. Additionally, two bullets fired from the .357 magnum recovered from Erika at Hooters on the night of May 31 were found in Mr. Ford's torso.

In an interview with Detective Bernal on June 24, 2002, Erika admitted to being present in the condominium that she shared with Benjamin when three of the shots were fired. Erika was scheduled to have a polygraph examination on July 23, 2002, but Deputy State's Attorney Scott Collins terminated the polygraph because of incriminating statements that Erika made in her pre-polygraph interview with United States Secret Service agents. Erika filed a Motion to Enforce the Memorandum, which she claimed required that the State give her the polygraph examination. The Circuit Court for Worcester County denied the Motion to Enforce the Memorandum on the grounds that the incriminating statements that Erika had made violated a condition of the MOU.

At Erika's jury trial, much testimony was received concerning Erika's behavior in the days after Martha Crutchley and Joshua Ford were killed. On Tuesday, May 28, 2002, Erika and Benjamin went outlet shopping in Rehoboth Beach. Erika got a new tattoo, and the couple went to a Home Depot store to buy supplies to replace the bathroom door and to purchase paint for the condominium. At the Home Depot, Erika met and spoke to Anne Wright, who testified at the trial as follows:

Q Now I want to direct your attention back to May 28th of 2002 last year. Were you in Ocean City resort area about that time?

A Yes.

Q And did you have occasion to go to the local Home Depot store?

A We did . . .

* * *

Q And who did you meet?

A Erika Sifrit

Q And did you see anyone else with her?

A Um, her husband.

* * *

Q Okay. Was the Defendant carrying anything?

A Um, she had a triangular shaped piece of wood.

Q And did she say anything to you about this triangular shaped piece of wood?

A She said do you believe that's all that's left of my door.

Q And did you respond?

A And I said that must have been some party.

Q Did she respond to you?

A She laughed and said I guess you could call it that.

The State's theory in both cases was that after leaving Seacrets that night, the two couples had returned to the Sifrits' condominium. Once in the condominium the Sifrits engaged in a "missing purse game" in which they claimed Erika's purse was missing. They demanded the other couple find the purse and when it couldn't be found, somehow got them into the upstairs bathroom where both Sifrits shot Mr. Ford and in some other manner killed Ms. Crutchley.

The State's theory is based in part on the testimony of Melissa Seling ("Melissa") who met the

Sifrits the night of May 29 through her friend Justin Todd Wright ("Todd"). Melissa testified that when she met Todd, he and the Sifrits were intoxicated and she was the only one that was sober. Melissa joined the Sifrits and Todd at a couple of bars but she did not drink. At the end of the evening, Melissa was worried about Benjamin's ability to drive so she agreed to follow the Sifrits back to their condominium. When the four arrived at the condominium, Melissa, at Benjamin's urging, helped Erika up to the condominium because she seemed so intoxicated that she might fall over without help. Then, once at the door, Erika located her keys in her purse and opened the door with no problem. Erika began showing Melissa around the condominium. Within 5-10 minutes of having the purse at the door, Erika and Benjamin claimed that someone had taken Erika's purse and that Melissa had to look for it.

At some point during the search for the purse, Benjamin brandished a gun and became more adamant about finding the purse. Benjamin made a number of statements during the search regarding people that had been there before who had tried to rip them off and that he was "doing the world a justice by ridding the earth of bad people." Melissa testified that he also told her "if we ripped them off . . . he would kill us the same way he killed those other people." Melissa was not clear in her recollection whether Benjamin had said "just like I killed the other people" or "just like we killed the other people" (emphasis added). Melissa testified that she felt threatened by the gun and asked that it be put away. She also testified that during the search she saw a door upstairs off of its hinges with a bullet hole in it. Eventually, Benjamin discovered the purse in a location that had previously been searched. He then sat down with Melissa to show her his gun and what he called Erika's gun, the .357 magnum used to kill Joshua Ford.

Erika was convicted of the first degree murder of Joshua Ford, second degree murder of Martha Crutchley, and theft related to the burglary at Hooters. She was sentenced to life imprisonment for the first degree murder of Mr. Ford, 20 years to run consecutive for the second degree murder of Ms. Crutchley, and 18 months to run concurrent for theft.[7] Additional facts will be provided throughout this opinion as appropriate to our analysis.

II.

The Memorandum of Understanding

The first question presented for our review by Erika is whether the State failed to comply with the express terms of the MOU.

Prior to her trial, Erika filed a motion to enforce the agreement she had made with the State and to dismiss the homicide charges against her.[8] After an evidentiary hearing, the Circuit Court for Worcester County denied her requests. Erika argues that this Court should reverse her murder convictions because "the State violated fundamental principles of fairness and due process by breaching its written agreement with Ms. Sifrit and prosecuting her for the homicides of Ms. Crutchley and Mr. Ford." Erika's argument is unpersuasive.

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[7] In a separate trial, Benjamin was sentenced to thirty years imprisonment for second degree murder of Martha Crutchley, 25 years to run concurrent for first degree assault of Martha Crutchley, and 5 years to run consecutive for accessory after the fact.

[8] The motion was filed in and decided by the Circuit Court for Worcester County prior to the case being transferred to the Circuit Court for Frederick County.

Given the plain language of the agreement and the obvious intent of the parties, the Circuit Court did not err when it denied Erika's motion to enforce the memorandum of understanding and to dismiss the homicide charges against her. Upon review of the record, it is clear that Erika breached the agreement when she made "prospective reliable inculpatory statements" after the signing of the agreement with the State. It is clear from the language of the agreement itself that if such statements were made, the State would not be obligated to refrain from prosecuting her for murder. In light of those facts, it was entirely proper for the State to refuse to honor the rest of the agreement.

As the State points out, the State entered into the agreement with Erika based on her representations that she had nothing to do with the murders. After the agreement was signed, but just before the polygraph examination was to take place, Erika answered some preliminary questions by the examiners and unexpectedly revealed an intimate knowledge of the gruesome details of the murders and even admitted to her direct participation in them.[9] She now argues that, despite her confessions, the State should have conducted the polygraph examination to determine if she would have tested "not deceptive." In view of the fact that her pre-polygraph confession to participation in the murders was a direct breach of the agreement, conducting the

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[9] Erika was advised of her *Miranda* warnings, *Miranda v. Arizona,* 384 U.S. 436 (1966), before the meeting with the examiners and there is no argument that *Miranda* has been violated. In addition, none of Erika's inculpatory statements made on the day of the meeting with the polygraph examiners were offered against her at trial.

polygraph after hearing those inculpatory statements would have been a pointless exercise.[10] To suggest that the State should have upheld its end of the bargain after the blatant breach by Erika is illogical and unpersuasive.

The written agreement referred to is a document entitled "Memorandum of Understanding" which was signed by the State's Attorney and by Erika's attorney on June 2, 2002. The first two paragraphs of the agreement read as follows:

> 1. In exchange for reliable information from the Defendant to the State detailing the way and manner in which the bodies of Martha Margene Crutchley and Joshua Ford were packaged prior to their disposal, as well as information on the location where the bodies were disposed of, the State of Maryland agrees not to seek the sentence of death or life without parole against Defendant.
>
> 2. Additionally, Defendant agrees to subject herself to a polygraph examination to be conducted by an active federal polygraph examiner, said examiner to be agreed upon

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[10] For example, three of the polygraph examination questions that would have been asked include: "Did you shoot a gun at any of those people? Did you cut on any of those people? Did you plan in any way to cause the death of those people?" As will be discussed further, after hearing the statements made by Erika about her participation in the murders, to conduct a polygraph examination in which questions such as those would be asked would have been pointless.

> by the State and Defendant. *If* Defendant tests "not deceptive" on all material questions related to the homicides of the victims referenced in Paragraph 1 above asked of her by the polygraph examiner, *and absent any compelling independent evidence to the contrary* (*i.e.* eye witness testimony, photographs and/or prospective reliable inculpatory statements by the Defendant) the State agrees not to prosecute Defendant for these homicide charges.

(Emphasis added.) In addition, paragraph 6 of the agreement notes that "if Defendant fails to comply with paragraphs 2 and 3[11] of this Memorandum of Understanding, this Memorandum of Understanding becomes null and void (except for Paragraph 1)."

After conducting an evidentiary hearing on the

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[11] The State notes in its brief that from the context of the agreement, it is apparent that this should have read "Paragraphs 2 and 4." Paragraph 3 notes that the State may prosecute Erika for accessory after the fact and any charges other than homicide that were noted in the Statement of Charges served on her on May 31, 2002. Paragraph 4 of the agreement states that:

> Defendant agrees to cooperate with the State in the prosecution of Benjamin Sifrit, her husband, and further agrees to testify truthfully on behalf of the State at his trial. Defendant agrees not to invoke her marital privilege at the trial or any pretrial hearing of Benjamin Sifrit. Defendant agrees to be interviewed by the State of Maryland as it prepares for the trial of Benjamin Sifrit.

matter, the trial judge determined that the agreement became null and void when Erika failed to comply with the conditions in Paragraph 2 of the agreement. The judge discussed the evidence of Erika's failure to comply with the agreement and noted the testimony regarding a conversation between the State's Attorney and Erika's then attorney. The judge noted that the parties agreed that "if she goes in there and tells the polygraph examiners, 'I'm the one that did one or more of the murders or I was an active participant in either one of them,' we don't have a deal." The judge stated that he believed the testimony that Erika's attorney agreed to that condition. Moreover, the judge stated:

> I also think that after the polygraph was called off by Mr. Collins and eventually Mr. Todd came down, I think the question was asked, "Are we in agreement now, she didn't complete the terms of this agreement?" or words to that effect, and that Mr. Tuminelli said, "Absolutely. Yes. That's so," or something close to that. He acquiesced and agreed. And I think that took place. I don't think they came in here and just simply made that up.

The judge also noted that he reviewed the interview between the polygraph examiners and Erika, and found that she did make "prospective reliable inculpatory statements."

Md. Rule 8-131(c) provides that when an action has been tried without a jury, "the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." We must consider the

evidence in the light most favorable to the prevailing party and decide "not whether the trial judge's conclusions of fact were correct, but only whether they were supported by a preponderance of the evidence." *Urban Site Venture II Ltd. Partnership v. Levering Assocs.*, 340 Md. 223, 230, 665 A.2d 1062, 1065 (1995). With that standard in mind, we see no reason to hold that the trial judge's findings of fact on this matter are clearly erroneous.

After reviewing the evidence, the trial court decided not to enforce the agreement against the State. The judge explained his decision by stating that there were certain conditions precedent to the agreement that Erika did not meet (meaning, not making any prospective reliable inculpatory statements) and that, consequently, most of the terms of the agreement were rendered impossible to perform. The trial judged summed up his reasoning by stating:

> [Erika] simply could not have answered the questions because they basically were the opposite of what she just told the polygraph examiner. So obviously she could not pass that part of it. She – it was – she made it impossible to perform. She did not meet the conditions precedent in the contract and that's how I see it.

The clearly erroneous standard does not apply to legal conclusions made by the trial judge, which are given no deference. This Court must determine whether the trial court's conclusions are legally correct "under a *de novo* standard of review." *Walter v. Gunter*, 367 Md. 386, 392, 788 A.2d 609, 612 (2002). The interpretation of a contract is ordinarily a question of law. *Wells v. Chevy Chase Bank, F. S. B.*, 363 Md. 232, 250, 768 A.2d 620, 629-30 (2001). In interpreting a written contract,

"where the language employed in a contract is unambiguous, a court shall give effect to its plain meaning and there is no need for further construction by the court." *Wells*, 363 Md. at 251, 768 A.2d at 630.

In addition to the objective principles of contract interpretation, the interpretation of the agreement in this case must also be interpreted by "'the standard to be applied to plea negotiations . . . of fair play and equity under the facts and circumstances of the case, which, although entailing certain contract concepts, is to be distinguished from . . .the strict application of the common law principles of contracts." *State v. Brockman*, 277 Md. 687, 697 (1976).[12] Even considering fair play

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[12] It is appropriate to consider fair play and equity when reviewing an agreement between the State and a criminal suspect, where criminal charges are involved, even if that agreement is not technically a plea agreement. *See Butler v. State*, 55 Md. App. 409, 428-32, 462 A.2d 1239, 1239-42 (discussing "miscellaneous bargains" with the State that are not plea agreements, but nonetheless implicate due process considerations "[w]here there is pending before the judge a criminal charge"). We point out for the sake of clarity that the agreement in this case was not a plea agreement. Erika made no promise to plead guilty or nolo contendere when entering this agreement with the State. *Gray v. State,* 38 Md. App. 343, 356, 380 A.2d 1071, 1079-80 (1977) (stating that a plea bargain or plea agreement "contemplates a conditional plea of guilty or nolo contendere to one or more pending charges, the condition usually being either the dismissal or lessening of other charges by one means or another, or some concession being made with respect to disposition, or both."). Nonetheless, it is appropriate to consider due process

and equity, we can see no reason for the State to continue to abide by an agreement that was rendered void solely by the voluntary actions of the defendant.[13] While it is true that fairness and equity "require the State to be held to its bargain," there is no such requirement if the defendant has not performed his or her obligations under the bargain. *Brockman*, 277 Md. at 698, 357 A.2d at 384; *Blinken v. State*, 291 Md. 297, 309, 435 A.2d 86, 91-2 (1981) (noting that both the State and the defendant have a duty to uphold the terms of the agreement between them); *Butler*, 55 Md. App. at 435, 437, 462 A.2d at 1243-4 (stating that "[t]here is, of course, the ever-present reality that [the defendant's] failure to abide by the terms of the agreement thereby relieves the State of any obligation to perform its part of the bargain;" and "If the appellant failed to live up to his promise, the State is, of course, relieved of its reciprocal obligation to forbear to bring charges."). One of Erika's obligations under the agreement in this case included an implicit representation that she was not culpable in the murders. Making "reliable inculpatory statements" as to her active participation in the murders is inherently incompatible

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when reviewing the agreement in the present case because there were criminal charges pending at the time of the agreement.

[13] We think it is important to note at this point that Erika was represented by counsel when the agreement was made and when she met with the polygraph examiners. Consequently, no persuasive argument can be made that the State took some kind of unfair advantage of an unrepresented suspect, requiring a different outcome because of notions of fair play and equity.

with that representation. The trial court found,[14] and it is clear from our review that she made such statements and that consequently, the State was no longer obligated to adhere to the agreement.

Because we do not think it is necessary to the resolution of the contract questions in this case, we do not adopt the trial court's statements regarding conditions precedent and impossibility of performance of the contract between the parties. We do agree, however, with the denial of the motion to enforce the memorandum of understanding, but for a different reason.

It is clear that Erika breached the agreement because her preliminary statements to the polygraph examiners constituted "prospective reliable inculpatory statements."[15] Therefore, it is equally clear, from the

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[14] The adequacy of the accused's performance of his or her end of the bargain is a factual question to be decided by the trial judge, unless the agreement between the accused and the State directs that someone else is empowered to decide if the accused has adequately performed. *Butler,* 55 Md. App. at 437, 462 A.2d at 1243-44.

[15] Erika has argued that the term "compelling independent evidence to the contrary" means evidence appearing only *after* (and of necessity to her argument, not before) the conducting of the polygraph examination. There is nothing in the language of the agreement that demands or even suggests that interpretation. She has also argued that the term "prospective" necessarily means only inculpatory statements made *after the polygraph examination*. We reject those interpretations of the language of Paragraph 2. In our view, it is clear from the language of Paragraphs 2 and 6 that any reliable

plain language of the agreement, that Erika failed to comply with Paragraph 2 of the agreement and that, as a result, the agreement became "null and void," pursuant to Paragraph 6 of the agreement. Erika's argument that the State made it impossible for her to comply with the agreement by refusing (after hearing her inculpatory statements) to conduct the polygraph exam is, thus, specious. In fact, Erika made it impossible for the State to continue to honor the agreement by her own actions. To argue that the State "had an absolute obligation to afford her the opportunity to take a polygraph examination" after Erika, of her own accord, unexpectedly confessed to direct participation in the murders, is untenable. Consequently, the cases cited by Erika regarding not permitting the State to repudiate its agreements are unavailing.[16] The State in this case did

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inculpatory statement made by Erika at *any time after the signing of the agreement* would be inconsistent with the premises of the agreement and would render void the State's promise not to prosecute the defendant for homicide.

[16] We note that the case of *Jackson v. State*, 358 Md. 259, 747 A.2d 1199 (2000), does not support Erika Sifrit's position. In *Jackson,* the State and the defendant agreed that the State would dismiss child sexual abuse and other charges against him if the defendant agreed not to oppose a postponement of his case and if he was exonerated by DNA testing of a stain on a sheet belonging to the victim. *Jackson,* 358 Md. at 262, 747 A.2d at 1200. As agreed, the defendant did not oppose the State's request for postponement. *Jackson,* 358 Md. at 263, 747 A.2d at 1201. In addition, the results of the DNA test excluded the defendant. *Id.* The State realized later that they had tested the wrong sheet and then refused

nothing to prevent Erika from complying with the agreement. Rather, Erika voluntarily made inculpatory statements after the signing of the agreement, rendering the agreement null and void and releasing the State from its promise not to prosecute her for homicide.

In order to support our holding that the Circuit Court did not err by finding that Erika made inculpatory statements, rendering the agreement null and void, it is

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to honor the agreement. *Id.* We noted that the defendant had performed his end of the agreement, and we held that the State should be held to its end of the bargain, even though the State, in hindsight, had made a bad deal. *Jackson,* 358 Md. at 278, 747 A.2d at 1209. The present case is distinguishable because Erika Sifrit made reliable inculpatory statements that implicated her in the murders, leading to the trial court's reasonable conclusion that she did not perform her end of the agreement. As noted by the Court in *Jackson,* "'[w]e think that once the State has made a bargain, it is bound to adhere to the agreement *so long as the accused performs his part.*'" *Jackson,* 358 Md. at 275-76, 747 A.2d at 1208 (quoting *State v. Thompson,* 48 Md. App. 219, 222, 426 A.2d 14, 16 (1981) (emphasis added).

Osborne v. State, 304 Md. 323, 499 A.2d 170 (1985), *abrogated on other grounds by State v. Hawkins,* 326 Md. 270, 604 A.2d 489 (1991), is similarly inapposite. In that case we held that the State could not rescind a plea agreement merely because it was surprised by the lower sentence imposed by the court after the defendant had performed his end of the agreement. *Osborne,* 304 Md. at 338, 499 A.2d at 177. Again, the present case is distinguishable because Erika breached the agreement she had with the State.

appropriate that we discuss the preliminary statements made by Erika to the polygraph examiners.[17]

On July 23, 2002, Secret Service Special Agents met with Erika at the Ocean City Police Station to administer a polygraph examination. Prior to the examination, the Special Agents gave Erika the *Miranda* warnings and informed her that the polygraph examination was a voluntary process.

After escorting Erika to the examination room, the Special Agents began the polygraph pre-test interview. At that time, a standard U.S. Secret Service medical questionnaire was completed, followed by a U.S. Secret Service history questionnaire. While completing the questionnaires, Erika, "talked about her life before being married and then began to detail the relationship between she and her husband, Benjamin Sifrit."

Erika then began to describe in great detail the events of the evening of May 25, 2002. Erika stated that she and her husband were vacationing in Ocean City, Maryland, when they met another couple, Joshua Ford and Martha Crutchley, while boarding a bus on their way to Seacret's nightclub. After hanging out all night at the club with Mr. Ford and Ms. Crutchley, both couples decided to go "party" back at the Sifrits' condominium at 1:30 a.m., now the morning of the 26th. They took a bus to the Atlantis (where Mr Ford and Ms. Crutchley were staying) to pick up swimsuits and then the four of them walked on the beach to the Sifrit's condominium.

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[17] The statements made by Erika are recorded in a July 24, 2002, "United States Government Memorandum U. S. Secret Service," written by one of the polygraph examiners and admitted into evidence at the motions hearing as Joint Exhibit 1.

Erika stated that Joshua, Martha, and Benjamin stayed on the beach and that she went into the condominium to get beers for everyone. Once inside the Sifrits' penthouse unit, she noticed that her purse was on the back of the couch and not where she had originally put it. She stated that her jewelry and pills were missing so she called 911 to report that there were, "[i]ntruders in my house and my stuff is missing." According to Erika, she hung up on 911 when Josh came upstairs. She yelled for Benjamin to come up. Erika and Benjamin then accused Joshua and Martha of taking their things and Benjamin grabbed Erika's gun and pointed it at Joshua and Martha. Erika stated that when Benjamin took the gun, she "knew he was going to kill them." Benjamin told them to take off their clothes. The victims complied and, according to Erika, asked Benjamin and Erika why they were doing this and said that they did not take any of the Sifrits' things.

According to Erika, Benjamin continued to point the gun at the victims and told them to "[g]et in the bathroom." Joshua and Martha locked the door behind them and were "yelling and pleading for their lives." Erika stated that Benjamin asked her, "I'm supposed to fucking waste them? Cool?" The narrative continues as follows:

> Mrs. Sifrit said they were, "getting very loud and I just wanted them to shut up." Mrs. Sifrit said she was worried about the police coming and people out on the beach hearing them. She stated she could hear Martha yelling "help me, help me, help me!" and banging against the glass on the bathroom window. She stated she could hear Josh pounding on the bathroom door and yelling "Why are you doing this!" over

and over.

Mrs. Sifrit stated she told B.J. to, "Just fucking do it! You got them naked, you put a gun to their heads, just do it!" After she told us that she had said, "Just fucking do it![,]" [s]he stopped for a minute during the interview and said, "Now you have me on murder." I asked Mrs. Sifrit what she meant by, "just fucking do it" and "just do it" and she continued by saying, "I meant just kill them." I asked Mrs. Sifrit this same question approximately ten times and her answer was always the same, "I meant kill them, I knew he wanted to."

* * *

B.J. fired the Smith & Wesson into the bathroom door and then kicked it open. She described the kick as being so hard that B.J. fell backwards. The bathroom door flew open and lodged itself in the wall. B.J. went into the bathroom and Mrs. Sifrit stated she saw Josh fall to the right side of the bathroom against a closet. She said he was shot. Josh was still yelling, "Why are you doing this?" She then watched as B.J. took a "head shot" on Josh. According to Mrs. Sifrit, she then wet her pants and went to go sit on the edge of the bed and "waited for it to be over." I asked what she meant by "waited for it to be over" and she said the killings. Mrs. Sifrit said she heard two more shots close together (about 5 seconds) and then B.J. came out flexing his muscles covered in blood she described that "he had obviously put on himself." B.J. called Mrs.

Sifrit into the bathroom.

Erika then went to the jeep to get their radios, check for their things on the beach, and to watch out for the police.

> She ran back up to the penthouse and into the bathroom. She stated B.J. said, "Baby, open your knife like I taught you. Get down there and check her to see if she's dead. Get down there and make sure . . ." Mrs. Sifrit said, "But, I thought you said she . . ." and Mrs. Sifrit walked over to Martha who was huddled in the fetal position under the vanity and began "to cut on her body." I moved into the position I thought Martha would have been in and Mrs. Sifrit corrected me and she herself got into the fetal position to show exactly how Martha was and where she cut on her body. Mrs. Sifrit said the blood was very deep around Martha and it got on her clothes as she went down on her knee to cut on Martha. She showed us the right side of her abdomen above her right hip as the location she cut. She said, "I was surprised how much pressure it took to cut the skin since I had never cut someone before. I cut her twice like this." Mrs. Sifrit showed us how she held the knife and cut Martha. After saying, "I cut her twice" she stopped and said, "now you have me on murder." I asked her if Martha was dead or alive when she cut on her. Mrs. Sifrit said she did not know but thought Martha was probably dead. I asked if she checked Martha in any way before cutting on her and she said,

"No."

Erika then went on to detail how the couple cut up the bodies, put them in black trash bags, placed them into Navy duffle bags and put the bodies in two separate dumpsters behind a grocery store. After sleeping for a while, the Sifrits cleaned the bathroom. The next day, on May 27, 2002, they went to the dumpsters to be sure that they had been emptied. Erika stated that sometime on May 27 or May 28, Benjamin "[m]ade a comment to her along the lines of, what a number she had done on Martha's throat. Mrs. Sifrit stated she did not deny cutting Martha's throat to B. J. She told us she was glad if he thought she had cut Martha's throat." In light of Erika's statements, the polygraph examiners did not administer the polygraph test.

It is clear, after reviewing the statements Erika made prior to her polygraph examination, that she breached the agreement by making reliable inculpatory statements and implicating herself in the murders. Once Erika breached the agreement, the State had no obligation to uphold its end of the bargain.

III.

Inconsistent Theories of Prosecution

The first question presented for our review is whether the State violated Erika's right to due process by presenting factually inconsistent theories of the case at her trial and that of her husband, Benjamin. This is a matter of first impression in this State. Other courts, however, have addressed the issue and in the vast majority of cases failed to find a due process violation. We likewise fail to find a violation here.

The court that has addressed the issue of inconsistent theories the most is the United States Court

of Appeals for the Ninth Circuit. It first addressed the issue briefly in the case of *Haynes v. Cupp*, 827 F.2d 435 (9th Cir. 1987), in which Haynes relied on evidentiary and argumentative differences between his trial and that of a co-defendant to argue that his right to due process had been violated. Then Judge, now Justice, Kennedy wrote for the court that "[i]t is true that the trials differed in emphasis. However, the underlying theory of the case, that all three defendants were equally culpable, remained consistent throughout. In view of this underlying consistency, the variations in emphasis are not cause for reversal." *Id.* at 439.

More than a decade later, that court was again presented with the question in *Thompson v. Calderon*, 120 F.3d 1045 (1997) (*en banc*), *rev'd on other grounds*, 523 U.S. 538 (1998). In *Thompson* two men were charged for the same murder. The court found that the prosecuting attorney had offered conflicting theories regarding the two men's motives for committing the crime. In Thompson's case, the State argued that Thompson had raped the victim and then killed her to cover up the rape. *Thompson*, 120 F.3d at 1056-57. In the second defendant's case, the State argued that he had killed her because he saw her as a threat to his ability to reconcile with his estranged ex-wife. *Id.* The State presented completely different witnesses in the two trials, who, in some instances, provided testimony that wholly contradicted the testimony given in the other trial. *Thompson*, 120 F.3d at 1057. Relying in part on their *Haynes* opinion, the court stated that "it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." *Thompson*, 120 F.3d at 1058. The court continued, however, "when there are claims of inconsistent prosecutorial conduct, reversal

is not required where the underlying theory 'remains consistent'" *Thompson*, 120 F.3d. at 1058-9 (quoting Haynes, 827 F.2d at 439). Applying this standard to Thompson's case, the court found that "little about the two trials remained consistent other than the prosecutor's desire to win at any cost." *Thompson*, 120 F.3d at 1059. The court held that Thompson's right to due process had been violated.

In *Shaw v. Terhune*, 353 F.3d 697 (2003), the Ninth Circuit again returned to the issue. Like in *Haynes*, the court found that there had not been a due process violation. Shaw and an accomplice were both convicted of several crimes arising from an attempted robbery. Despite the fact that the evidence established that only one person had personally used a firearm during the robbery, the prosecutor argued at both trials that the man currently on trial had been the one to use the firearm. *Shaw*, 353 F.3d at 699. The court reviewed its holding in *Thompson* and found it "sufficiently dissimilar to the instant case that it is distinguishable." *Shaw*, 353 F.3d at 702. The court noted that the *Thompson* case had rested on the "'peculiar facts' of the case." *Shaw*, 353 F.3d at 702 (quoting *Thompson*, 120 F.3d at 1059). "The prosecutor in *Thompson* did not merely suggest varying interpretations of ambiguous evidence; he 'manipulated evidence and witnesses, argued inconsistent motives, and in [the other defendant's] trial essentially ridiculed the theory he used to obtain a conviction and death sentence at Thompson's trial.'" *Shaw*, 353 F.3d at 702 (quoting *Thompson*, 120 F.3d at 1057). "By doing so, the prosecutor brought his conduct squarely within an area forbidden by the Supreme Court – the 'knowing [] present[ation of] false testimony.'" *Shaw*, 353 F.3d at 703 (quoting *Thompson*, 120 F.3d at 1058) (internal citations omitted) (alteration in original). Returning to the facts of *Shaw*, the court stated "[i]n this case, Shaw does not

contend that the prosecutor presented false evidence, and in reality cannot do so, because the evidence was nothing more than ambiguous. The evidence presented at the two trials was almost identical, and supported several critical conclusions . . . ." *Shaw*, 353 F.3d at 703. The Court concluded that

> [c]learly established federal law prohibits a prosecutor from 'knowingly presenting false evidence;' it does not preclude that prosecutor from suggesting inconsistent interpretations of ambiguous evidence. When prosecutors confront truly ambiguous evidence that supports multiple convictions for what is inherently a unilaterally committed crime, there are competing concerns involved. In these situations, prosecutors must retain some amount of discretion to change theories in later trials.
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> Since no clearly established federal law precludes a prosecutor from supporting two theories which are in tension with one another but which are each arguably supported by ambiguous evidence, Shaw's due process rights were not violated . . . .

Shaw, 353 F.3d at 703, 705 (citing *Nguyen v. Lindsey*, 232 F.3d 1236 (9th Cir. 2000)).

The holding in *Shaw* is consistent with the Ninth Circuit case *Nguyen v. Lindsey*, in which the court found that a defendant's right to due process is not violated when a prosecutor uses inconsistent arguments at separate trials, provided the arguments are consistent with the evidence adduced at each trial and provided the

prosecutor does not knowingly use false evidence or act in bad faith.[18] *Id.* at 1240.

In *Thompson*, the Ninth Circuit relied, in part, on a concurring opinion accompanying the *en banc* rehearing of an Eleventh Circuit case, *Drake v. Francis*, 727 F.2d 990 (11th Cir. 1984), *rev'd on different grounds en banc*, *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985). In *Drake v. Francis*, the defendant argued that by pursuing "wholly inconsistent theories" in his and a co-defendant's trial, the prosecution violated his right to due process. *Drake*, 727 F.2d at 994. Drake and a co-defendant were charged and convicted of the murder and armed robbery of a barber in Colbert, Georgia. In the co-defendant's trial the prosecutor argued that the co-defendant committed the murder while Drake played a lesser role. In Drake's trial, a year later, the prosecutor argued that the co-defendant was too old and weak to have committed the murder by himself and that Drake must have played a more significant role. The court found that

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[18] From a practical standpoint, the *Nguyen* court noted:

> Nor is it shocking or even unusual that the evidence came in somewhat differently at each trial. Any lawyer who has ever tried a case knows that trial preparation is not a static process. As a case evolves, new witnesses come forward; others become unavailable. As new evidence is uncovered, other evidence loses its significance. What is received in evidence by stipulation in one trial might draw vigorous objections in another.

Nguyen, 232 F.3d at 1240.

"the only inconsistent theory propounded in the two trials was that [the co-defendant's] prosecutor believed [the co-defendant] was the sole murderer while in Drake's case, the district attorney urged that, due to sheer physical necessity, Drake must have participated in the attack as well." *Id.* "Viewed in this light," continued the court, "the two theories are fairly consistent and there was no due process violation." *Id.* On rehearing *en banc*, the majority of the court declined to reach the issue, instead granting relief on other grounds. *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (*en banc*).

In *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), *cert. denied*, *Gammon v. Smith*, 531 U.S. 985 (2000), the United States Court of Appeals for the Eighth Circuit addressed the issue in the context of a prosecutor relying on two wholly inconsistent and irreconcilable statements made by the same witness. In the first of two trials in *Smith*, the prosecution relied on a statement by a witness that the victims were alive when they entered the house and that a colleague of the witness testifying had, in fact, killed the victims. *Smith*, 205 F.3d at 1048. In a subsequent trial of a different defendant, the prosecutor relied on a different statement made by the same witness that the victims were dead when they arrived at the house. *Id.* "In short, what the State claimed to be true in [the first case] it rejected in [the second case], and vice versa . . . . This before/after distinction is the heart of the prosecutorial inconsistency that allowed the State to convict as many defendants as possible in a series of cases in which the question of timing was crucial." *Smith*, 205 F.3d at 1050-1051. Although the court held that the actions of the State in this case "constituted foul blows . . . that fatally infected Smith's conviction," the court also noted that "[w]e do not hold that prosecutors must present precisely the same evidence and theories in trials for different defendants. Rather, we hold only that

the use of inherently factually contradictory theories violates the principle of due process." *Smith*, 205 F.3d at 1052. The court continued by noting that "Smith's situation is unusual, and we doubt that claims such as his will often occur. To violate due process, an inconsistency must exist at the core of the prosecutor's case against the defendants for the same crime." Id.

The theme requiring an inconsistency at the core of the state's case before finding a due process violation runs throughout the majority of cases that have addressed the issue. *See Clay v. Bowersox*, 367 F.3d 993, 1004 (8th Cir. 2004) ("'To violate due process, an inconsistency must exist at the core of the prosecutor's cases against the two defendants for the same crime,' and the State's error must have 'rendered unreliable' the [petitioners] conviction."). *Id.* at 1004 (quoting *Smith*, 205 F.3d at 1052); *United States v. Paul*, 217 F.3d 989, 998-99 (8th Cir. 2000), *cert. denied*, 534 U.S. 829 (2001) ("When it cannot be determined which of two defendants' guns caused a fatal wound and either defendant could have been convicted under either theory, the prosecutor's argument at both trials that the defendant on trial pulled the trigger is not factually inconsistent. Thus, because there was evidence that supported both theories, and since Paul could have been convicted of aiding and abetting under either theory, we find no error."); *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995), *cert. denied*, *Nichols v. Johnson*, 518 U.S. 1022 (1996) (Finding that where the facts support the conclusion that either defendant could have fired the fatal shot, the prosecutor did not violate due process by arguing at separate trials that the man on trial was the one responsible for the fatal shot.); *Illinois v. Caballero*, 794 N.E.2d 251, 264 (Ill. 2002) ("We conclude that no due process violation has occurred in the present case when the State's shifting positions involved matters of opinion, not of underlying fact."); *Iowa v.*

Watkins, 659 N.W.2d 526, 532 (Iowa 2003) ("We are convinced that [*Thompson* and *Smith*] only stand for the proposition that a selective use of evidence by the prosecution in order to establish inconsistent factual contentions in separate criminal prosecutions for the same crime may be so egregious and lacking in good faith as to constitute a denial of due process. We view those situations as a narrow exception to the right of the prosecution to rely on alternative theories in criminal prosecutions albeit that they may be inconsistent . . . . This right is particularly obvious in cases in which the evidence is not clear concerning which of two persons is the active perpetrator of the crime and which of them is an aider and abettor of the active perpetrator." (Internal citations omitted.)).

Based on our analysis of the relevant case law, we are in accord with the courts that hold that a due process violation will only be found when the demonstrated inconsistency exists at the core of the State's case. Discrepancies based on rational inferences from ambiguous evidence will not support a due process violation provided the two theories are supported by consistent underlying facts. We recognize that the evidence presented at multiple trials is going to change to an extent based on relevancy to the particular defendant and other practical matters. The underlying core facts, however, should not change. The few courts that have found due process violations did so in cases where the inconsistencies were inherent to the State's whole theory of the case or where the varying material facts were irreconcilable. It is this type of inconsistency that renders the conviction fundamentally unfair, thus violating due process. With this standard in mind, we return to the present case.

Erika relies primarily on four ways in which she

believes the State's case differed in the two trials and in which she believes the differences rise to a violation of due process. They are: (1) ownership and possession of the murder weapon, (2) the testimony of Michael McInnis, (3) the testimony of Melissa Seling, and (4) the number of shots fired by each of the Sifrits.

None of the differences in the two trials alleged by Erika go to the State's underlying theory of the case which remained consistent throughout both trials, which was that Benjamin and Erika committed the crimes together. The differences raised are differences in emphasis and inferences regarding certain facts tending to show the guilt of the defendant currently on trial, but in no way exculpating the other Sifrit. Evidence offered tending to show Benjamin's guilt is not necessarily relevant to show Erika's guilt. Provided the evidence remains consistent with the underlying facts, the inconsistent emphasis or inferences will not amount to a due process violation.

We begin with the issue of who owned the murder weapon. The evidence presented at the two trials established that both Benjamin and Erika had access to the murder weapon throughout the week. According to the evidence, Benjamin purchased the gun, apparently for Erika, both had possession of the gun at varying times during the week following the murders, and the two often exchanged their various weapons. Based on these facts, it is not inconsistent for the State to argue at Benjamin's trial that the murder weapon was his.[19] Nor is it

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[19] The State's actual argument in Benjamin's trial regarding the weapon was, in part, that "Benjamin Sifrit, the defendant, controlled both guns on various occasions" and that the gun "was purchased by the defendant. He picked it out for his wife, and yet he would have you

inconsistent with the facts for the State to argue at Erika's trial that the weapon was hers. The facts and inferences support both conclusions. Furthermore, considering the facts established that the Sifrits often exchanged their weapons and both had access to the murder weapon, determining who actually "owned" it is of no consequence.

The same is true with regard to the issue of whether Erika fired one shot or two. In both trials the State recognized that no one besides Erika and Benjamin can know for certain who fired which bullet.[20] The facts

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believe that he never fired it."

[20] In Benjamin's trial the State argued:

> I will never know and you will never know who pulled the trigger on that gun that night, but one thing is for certain: they were both there and they both – whichever one of them didn't pull the trigger aided and abetted the murder by helping the other one.

In Erika's trial the State argued:

> No one in this room will ever know who did what to whom that night. There's certainly inferences to be drawn from the facts in this case, and the State has argued those inferences to you, but none of us will ever know definitively what happened in that room, but it's clear that the defendant was there. It's clear that the defendant participated to the extent of luring these people up there. She aided and abetted the crime of murder, which makes her guilty of the crime of murder.

established that four shots were fired from the .357 magnum. Two of the four shots were found in Mr. Ford's torso. The other two bullets were found on the table in the Sifrit's condominium, one with flesh on it that matched Mr. Ford's DNA. It was the State's consistent theory that both Sifrits were present for the murders and that both participated in them by actually shooting at Mr. Ford and by luring the couple up to the apartment. Whether Erika's participation in the murders is limited to firing one shot or two, or simply by aiding Benjamin in luring the couple to their deaths, does not affect her culpability. Under either theory a jury could find both participants guilty of murder. This distinction falls squarely within the permissible differences allowed in *Paul*, *Nichols*, *Caballero*, and *Watkins* discussed above.

Erika also argues that the State's characterization of the testimony of Michael McInnis ("McInnis") in the two trials amounted to a due process violation.

McInnis is a former Navy SEAL and friend of Benjamin. He was called by the defense at Erika's trial to recount a conversation that he had with Benjamin. McInnis testified that in 1999 the two men were at a strip club having drinks when the discussion turned to how Benjamin would dispose of a body if he ever killed someone. The conversation arose when McInnis asked Benjamin to "whack" his wife for him, to which Benjamin allegedly responded "[y]eah, sure." McInnis asked what the going rate was for "whacking" someone, to which Benjamin responded around $30,000. According to McInnis, Benjamin stated that he would dispose of the body by laying down plastic in a living room or an open space and then remove the arms, legs and head with a knife. Then he would remove the body in separate bags and dispose of the body in either the same dumpster over the course of a month or in different

dumpsters throughout the city in a single trip. McInnis testified that the conversation was a typical conversation between SEALs, that they were "simply talking trash with guys over a few beers," and that the conversation was not to be taken seriously.

Erika argues that the State took inconsistent positions in the two trials with regard to this testimony. In Benjamin's case, the State made reference to this evidence as "crucial," but in rebuttal closing remarks in Erika's trial the State argued:

> Michael McInnis told you as far as he was concerned, this was just guys talking over beer and nobody was serious about it. Now, that would sound easy if none of this other stuff had happened. Certainly it was a joke in McInnis's mind. In light of what happened this past Memorial day, perhaps it wasn't a joke in Benjamin Sifrit's mind. But, ladies and gentlemen, the important issue is not who quartered the bodies and put them in the dumpster, the important issue is who's responsible for their deaths?

We find Erika's argument unpersuasive. The question of whether Benjamin had thought about killing someone and how he would dispose of the dead body if he ever murdered someone is clearly more relevant to the State's case against Benjamin than it is to Erika's guilt or innocence in her role(s) regarding the murders. This is unlike *Thompson* where the prosecutor "essentially ridiculed the theory he used to obtain a conviction and death sentence in Thompson's trial." Rather, McInnis's testimony established that Benjamin had considered committing almost the same type of crime three years before, not that he was incapable of committing the crime by himself. Furthermore, the question of whether the

conversation was a joke is a matter of opinion, not fact. *See Illinois v. Caballero*, 794 N.E.2d 251, 264 (Ill. 2002) ("We conclude that no due process violation has occurred . . . when the State's shifting positions involved matters of opinion, not underlying fact."). The State's shifting position regarding whether McInnis's opinion that the conversation was a joke does not affect the core of the State's case and does not support a due process claim.

The final way in which Erika claims the State presented inconsistent theories is with regard to its reliance and interpretation of Melissa Seling's testimony at the two trials.

Melissa Seling was called as a State's witness against Benjamin and a defense witness in Erika's trial. At various points in Benjamin's trial, Melissa stated that Benjamin had told her that he was ridding the world of bad people, or that if they were "ripping them off, you know, he has had other people rip them off and if we ripped him off like the other people that were here, he would do the same thing to us that he did to them referring to the bullet hole in the door." On cross-examination in Benjamin's trial, the defense asked Ms. Seling "[y]ou are unsure whether or not he ever said he killed anyone, she killed anyone, or they both killed anyone; isn't that right, Ms. Seling? To which she responded, "[n]o matter how you pick apart the words, he admitted to me throughout the night that in one way or another he was involved in the murder of these two people." Counsel then questioned her regarding her statement to the police shortly after the murders in which she said "[h]e was waving the gun around and making connotations to the people that they murdered and I am not sure if it was he murdered or she murdered or they both, you know, murdered them." The attorney asked if that was the truth at the time and she said it was still the

truth. She eventually responded:

> He stated to me several times throughout the night that he was involved in these murders. Those ID's, those people, you know, with the bullet in the door and everything. You can't just pick words apart like that and try to shift the blame, you know. The two people were there that night, four people and only two came out and that is what this is about.

In its closing argument in Benjamin's trial, the State argued that Melissa

> is the best witness in this case, and I don't say that just because her testimony helps the State a lot, but everybody else in this case was so – had been drinking and Melissa had not.
>
> * * *
>
> She told you the defendant told her, "If you're ripping us off, I'll do the same to you as I did to that other couple." He claimed he was ridding the earth of bad people. He admitted that he was involved in the killing of those two people, and he told her, "I don't overreact; I just react."

Later, in its rebuttal argument, the State argued:

> Melissa told you the truth. Melissa was under oath today. She was not under oath when she talked to the police. There is no testimony or evidence that they placed her under oath when they questioned her.

The State then argued that Benjamin had admitted to these murders and that he had opened his heart to Melissa in stating "I killed two people. I killed two people."

In Erika's trial, Melissa was called as a defense witness and aggressively examined. She testified essentially as she did at Benjamin's trial with the same uncertainty regarding whether Benjamin uttered "he killed, she killed, they killed." The defense, obviously, was emphasizing her statements in which she stated Benjamin had said he killed the people or words to that effect. On cross-examination she testified that she was not positive which pronoun, "I, she, they," Benjamin had used, but that her general impression was that he was involved. She also confirmed that she has never testified that Benjamin said anything about Erika not being involved.

In its closing remarks in Erika's trial, the State argued:

> Melissa Seling was called to the stand Friday by the defense. She was a defense witness. Melissa Seling told you that she wasn't drinking that night, and that's uncontradicted. But B.J. was.
>
> * * *
>
> Melissa was told that there has been another couple there a couple of nights before who tried to rip them off, and she told you that the defendant's husband said either I killed, she killed, or we killed, she wasn't sure which. Now, granted on one occasion she said I killed, quoting the husband. On another occasion she said we killed. Because of that contradiction, Det. Case told you that he asked her to clarify that, and then that's when she came back and said I killed, we killed, she killed, she wasn't sure.

The main thrust of the State's closing argument, however, was that the two were working as a team:

> These two people are working as a team, ladies and gentleman. Erika, the defendant in this case, and B.J. Sifrit were working as a team. They worked as a team all week long. They were working as a team when they broke into Hooters. They were working as a team, we know, when they lured Melissa back to the unit, and I would submit, ladies and gentleman, they were working as a team when they got Josh and Geney back to the unit and ultimately killed them. Why invite two people back to your unit, your room, if you're completely innocent of what had happened a few nights before? Why would you ask two people to come back there and risk being harmed? If your husband is the bad guy, if your husband is the murdering son-of-a-gun that did this, why would you invite another couple to come there? It's an easy answer. Because you participated in it. You got a rush. You wanted them to come back. You wanted another rush.

Based on our review of the record, we find no inconsistency in the State's position in the two cases. Melissa's testimony, while at times confused regarding whether Benjamin said "I killed, she killed or they killed," was fundamentally consistent throughout both trials. She may have been confused at various times regarding the pronoun used, however, she was clear that her impression of Benjamin's comments that night was that Benjamin had participated in the murder. She did not

testify that anything that night led her to believe Erika was not involved, nor has the State ever taken this position. We find no inconsistency in the State's position sufficient to justify concluding that a due process violation occurred.

IV.

Search of Erika's Purse

The last question presented for our review is whether the trial court erred in denying Erika's motion to suppress evidence recovered from her purse the night she was arrested at Hooters. Erika made an oral motion to suppress the identification cards, shell casings, and everything that flowed from the search because she claimed that the search of her purse was unlawful. The Circuit Court denied the motion finding that the search of the purse was "valid and legitimate." The Court found that the search was permissible for any one of three reasons: (1) it was a search incident to a valid arrest, (2) it would have been inevitably discovered when the car was searched, (3) Erika consented to the search. We shall hold that the search was valid based on Erika's consent.[21]

Judge Battaglia, writing for this Court in *State v. Green*, 375 Md. 595, 826 A.2d 486 (2003), summarized our standard of review in Fourth Amendment cases. She wrote:

> The ultimate burden of proving that evidence seized without a warrant should not be suppressed falls on the State. In reviewing a Circuit Court's grant or denial

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[21] Because we find the search lawful based on consent we do not reach the issue of whether it would have been valid based on the other two theories.

> of a motion to suppress evidence under the Fourth Amendment, we ordinarily consider only the information contained in the record of the suppression hearing and not the trial record. Where, as here, the motion to suppress was denied, we view the facts in the record in the light most favorable to the State, the prevailing party on the motion. With respect to weighing and determining first-level facts (such as the number of officers at the scene, the time of day, whether certain words were spoken, etc.), we extend great deference to the fact-finding of the suppression hearing judge. Therefore, "when conflicting evidence is presented, we accept the facts as found by the hearing judge unless it is shown that his findings are clearly erroneous." As to the ultimate conclusion of whether there was a Fourth Amendment violation, however, "we must make our own independent constitutional appraisal by reviewing the law and applying the facts of the case."

Green, 375 Md. at 607, 826 A.2d at 493 (internal citations omitted).

The Fourth Amendment to the United States Constitution provides, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." It is made applicable to the States by application of the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081, 1090 (1961); *Dashiell v. State*, 374 Md. 85, 94, 821 A.2d 372, 377 (2003). "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500

U.S. 248, 250, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297, 302 (1991) (citing *Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967)). The Supreme Court has long approved consensual searches because it is clearly reasonable for a police officer to search something once they have been given permission to do so. *Jimeno*, 500 U.S. at 250-51, 111 S.Ct. at 1803, 114 L.Ed.2d 302 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973)). The scope of a suspect's consent is measured by an objective standard. *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1803, 114 L.Ed.2d at 302 (1991). The question is, "what would a reasonable person have understood by the exchange between the officer and the suspect" to be the scope of the consent? *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1803-1804, 114 L.Ed.2d at 302 (citing *Illinois v. Rodriquez*, 497 U.S. 177, 183-89, 110 S.Ct. 2793, 2798-2802, 111 L.Ed.2d 148 (1990)). The Court must also consider what the parties knew to be the object of the search at the time. *In re Tar[illegible] 4-R-Y*, 347 Md. 484, 497, 701 A.2d 691, 697 (1997) (citing *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1803-04, 114 L.Ed.2d at 302-03 (1991)).

The only witness to testify at the suppression hearing regarding the search of the purse was Sgt. Beene. He testified that Erika had informed him that she had anxiety problems and was going to have a panic attack if she didn't take her medication, Xanax and Paxil. She told him what they looked like and that they were not in their original containers, rather they were in a brown zippered pouch in her purse. When Sgt. Beene looked in the brown zippered pouch, however, he only found one type of the requested pills. Next to the brown pouch was a red zippered pouch of the same size and feel as the brown one. He looked in the red pouch and found drugs inside but not the other one described by Erika. While continuing his search for the remaining pill, he looked in

an open zippered area in the back of the purse and discovered spent shell casings. He also noticed "a gray change purse, snap-type change purse" that he opened to see if the medication was in there. Instead of the medication, Sgt. Beene found the identifications of Martha Crutchley and Joshua Ford, whom he recognized from their missing persons fliers. Shortly after the discovery, the immediate search of the Sifrits' condominium was ordered. The second type of pill was never found in the purse.

Erika argues that the scope of her consent was limited to the search of the brown zippered pouch located in her purse. The State, however, argues that Erika had asked the officer to retrieve her medication, therefore it was reasonable for Sgt. Beene to look in the other places in the purse where the medicine might be located.

It is beyond question that the search was voluntary. Erika asked Sgt. Beene to go into her purse and retrieve her medication. The remaining question is what would a reasonable person have understood by the exchange between Sgt. Beene and Erika to be the proper scope of the consent? In making this determination we must take into consideration what the parties knew at the time of the search. Applying this standard, we conclude that, viewed objectively, it was entirely reasonable for Sgt. Beene to continue to look in Erika's purse for the missing medication. The purpose of the request and the subsequent search was to obtain Erika's medication to address her imminent panic attack. The subject matter of the search was the medication, not the brown pouch. Therefore, we hold the scope of Erika's consent extended to those parts of her purse which physically could have contained the requested medication. The search of Erika's purse and the pouches within it for her requested medication did not violate the Fourth Amendment.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

IN THE CIRCUIT COURT FOR
FREDERICK COUNTY, MARYLAND

STATE OF MARYLAND	)	
	)	
v.	)	Criminal Case No.
	)	K-02-31811
ERIKA E. SIFRIT,	)	
Defendant.	)	
	)	

REPORTER'S OFFICIAL TRANSCRIPT OF
PROCEEDINGS

(Jury Trial - Volume 7 of 8)
Frederick, Maryland
June 9-10, 2003

BEFORE:
THE HONORABLE G. EDWARD DWYER, JR.,
JUDGE
APPEARANCES:
For the State:
SCOTT E. COLLINS, ESQ.
JOEL J. TODD, ESQ.
Office of the State's Attorney for Worcester Co.
For the Defendant:
THOMAS R. CERASO, ESQ.
ARCANGELO M. TUMINELLI, ESQ.

Transcribed by:
Susan J. Wildermuth
Courthouse
100 West Patrick Street
Frederick, MD 21701

* * *

THE COURT: As to the motion for verdict of acquittal, it's denied as to all counts. As to what the jury chooses to believe or not to believe is up to the jury, but there is sufficient evidence, if believed by the jury, and the inferences which can be fairly drawn from that for them to come back with verdicts as to all remaining counts. I say that because the State nol prossed two more today.

As to the defense motion basically on the murder counts only, as to the due process argument citing the Thompson case and the 9th Circuit cases, the statements of Mr. Todd in both closing and rebuttal, I don't know if the rebuttal was made by Mr. Collins or Mr. Todd, but by State's Attorney's, was basically they both did it. He also says he did it, but when they say they both did it, he can also turn around and say he did it. If he had said to that jury in Montgomery County that only Benjamin did it, there may have been a due process argument. The theory that they both did it is not inconsistent with today's hearing, and the motion, I'll call it to dismiss, or for verdict of acquittal, whichever the defense wants to characterize it, for violation of due process is denied.

* * *

IN THE CIRCUIT COURT FOR
WORCESTER COUNTY, MARYLAND

STATE OF MARYLAND	)	
	)	
v.	)	Criminal Case No.
	)	23-K-02-000494 &
ERIKA ELAINE SIFRIT	)	23-K-02-000495
Defendant.	)	
	)	

REPORTER'S OFFICIAL TRANSCRIPT OF
PROCEEDINGS

September 30, 2002
Snow Hill, Maryland

BEFORE:
THE HONORABLE THEODORE R. ESCHENBURG.

APPEARANCES:

On behalf of the State:

KATHLEEN E. SMITH. ESQUIRE
ALFRED J. O'FERRALL. ESQUIRE
E. SCOTT COLLINS. ESQUIRE

On behalf of the Defendant:

ARCANGELO TUMINELLI. ESQUIRE
FRED WARREN BENNETT. ESQUIRE

Reported by:
Daphne S. Hurley, RPR
Snow Hill, Maryland 21863

* * *

THE COURT: All right. Well, I think we can all agree that everybody's stuck with the language contained in paragraph 2, including the court.

You know, it's an interesting spin that you put on this, but that's quite frankly how I see it. It's a spin. And I really wasn't expecting this today, but it at least to some degree has come down to a question of credibility, which evidence is more credible than the opposing evidence to it.

And I just simply believe that, and therefore disbelieve the evidence that is contrary to it, that a discussion was had with Mr. Tuminelli. That, you know, we got -- "you understand now, if she goes in there and tells the polygraph examiners, 'I'm the one that did one or more of the murders or I was an active participant in either one of them,' we don't have a deal" and for which he said, "Yeah, that's right," in so many words, I think that took place.

I also think that after the polygraph was called off by Mr. Collins and eventually Mr. Todd came down, I think the question was asked, "Are we in agreement now, she didn't complete the terms of this agreement?" or words to that effect, and that Mr. Tuminelli said, "Absolutely. Yes. That's so," or something close to that. He acquiesced and agreed. And I think that took place. I don't think they came in here and just simply made that up.

MR. BENNETT: Well, Your Honor – -

THE COURT: No, no. You're done.

MR. BENNETT: Okay.

THE COURT: Now it's my turn. And you know, I told you that I studied this. Believe me, I'm aware of the importance of this case for your client and for the State. And being so aware of it, that we started very early last week. Actually, I started at the time the motions were filed. But fortunately, court was very light last week, which gave me a lot of opportunity to bring my law clerk in, who is sitting right over there now, and to literally keep him running back and forth from the library to my office.

So it's not like I came out here this morning cold turkey. Every single case, no exceptions, that have been quoted has been read by me and, in fact, is contained in this file. You will see, as is my habit, and you can tell just by these papers sitting on top of the pile, that I underline in red what I consider what's significant so I can just sort of find it quickly.

And you know, the Memorandum of Understanding, needless to say, was a very important document, because actually there was an oral agreement first and then there, eventually there was this Memorandum of Understanding, and then there was a letter and that was followed by yet another agreement, which we've heard very little bit about today. Most of what we heard about today, and I can understand why because that's certainly an extremely critical document, is the Memorandum of Understanding.

But you know, I've heard about an anticipatory breach. You know, these contractual, contract type arguments. But the way I read this, it's not an anticipatory breach at all. What it was; because of the answers given, that is to the hot questions, the red

questions, that was fully not anticipated by Tuminelli, not anticipated by the State in light of what his own client had told him, that these questions, obviously if you look at them, will no longer work.

So it's apparent to me that when you look at the questions she was expected to pass, that is, the hot questions, that in view of the answers that had been given it was impossible for her to complete this agreement. So what we really have is not an anticipatory breach. As I see it, what we have is an impossibility of performance.

She had -- there were certain conditions precedent and she didn't meet them, and the one she didn't meet is the one you're putting the spin on. And I'll just read the one line. We've read so much of this paragraph. I'm just going to read the one line from Paragraph 2 of the Memorandum of Understanding. "If defendant tests not deceptive on all material questions related to the homocides of the victims referred to in paragraph 1 above asked of her by the polygraph examiner," and, "and absent any compelling independent evidence to the contrary, i.e., eye witness testimony, photographs, and/or prospective reliable inculpatory statements by the defendant." And I emphasize "by the defendant."

Now, I've read the material that you gave me to read in camera. I don't think anyone has even suggested today that she did not make prospective reliable inculpatory statements. In fact, she did. Those pages are not numbered, the paragraphs aren't numbered. Counsel has asked me to keep them sealed, so I'm just simply going to make the statement I made. Any appellate court can read that and read that transcript

where she is downstairs, in the transcript, and then yet when she goes to the polygraph examiner she's not downstairs.

It says something very much to the contrary, which is absolutely in more than one respect and in more than one spot is prospective reliable inculpatory statements by her that she was not downstairs just listening to the shots go off, but that she had a much more active role in it than she had told anybody, including her attorney. And I think that's what Mr. Todd meant when he said that Mr. Tuminelli looked like a deer who had been caught in the car lights. I think that's what he was referring to.

And I think what he meant to suggest by that was that his client had just given him a bill of goods and he believed her. But yet when the agreement was reached, it was entered into, she goes there with these hot questions, which in my opinion the evidence clearly shows were to be answered in a negative, and she had to pass those answering them in the negative, that in view of what she had already testified to she could not; thus, the impossibility of performance.

She simply could not have answered the questions because they basically were the opposite of what she just told the polygraph examiner. So obviously she could not pass that part of it. She -- it was -- she made it impossible to perform. She did not meet the conditions precedent in the contract and that's how I see it.

Accordingly, the Motion to Enforce the Memorandum of Understanding and to Dismiss the Homicide Charges is denied.

However, the Memorandum of Understanding does have a final paragraph 6 which says, "If defendant fails to comply with paragraph 2 and 3 of this Memorandum of Understanding this Memorandum of Understanding becomes null and void except for paragraph 1." And paragraph 1, rather than to read that whole thing, just simply says the State of Maryland agrees not to seek the sentence of death or life without parole against the defendant.

* * *

IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

STATE OF MARYLAND Criminal Docket

vs. Case No. 23-K-02

ERIKA ELAINE SIFRIT

* * * * * * * * * *

MEMORANDUM OF UNDERSTANDING

The State of Maryland, by Joel J. Todd, State's Attorney for Worcester County, and the Defendant, by and through her attorney Arcangelo M. Tuminelli agree as follows:

1. In exchange for reliable information from the Defendant to the State detailing the way and manner in which the bodies of Martha Margene Crutchley and Joshua Ford were packaged prior to their disposal, as well as information on the location where the bodies were disposed of, the State of Maryland agrees not to seek the sentence of death or life without parole against Defendant.

2. Additionally, Defendant agrees to subject herself to a polygraph examination to be conducted by a [sic] an active federal polygraph examiner, said examiner to be agreed upon by the State and Defendant. If Defendant tests "not deceptive" on all material questions related to the homicides of the victims referenced in Paragraph 1 above asked of her by the polygraph examiner, and absent any

compelling independent evidence to the contrary (*i.e.* eye witness testimony, photographs and/or prospective reliable inculpatory statements by the Defendant) the State agrees not to prosecute Defendant for these homicide charges.

3. The State may prosecute Defendant on charges of Accessory After the Fact to these two homicides, as well as any other charges (other than homocide [sic] in any degree) in the Statements of Charges served upon the Defendant on May 31, 2002, as well as any CDS charges or Obstruction of Justice charges which may be incident to the facts alleged in these Statements of Charges, even though not yet charged.

4. Defendant agrees to cooperate with the State in the prosecution of Benjamin Sifrit, her husband, and further agrees to testify truthfully on behalf of the State at his trial. Defendant agrees not to invoke her marital privilege at the trial or any pretrial hearing of Benjamin Sifrit. Defendant agrees to be interviewed by the State of Maryland as it prepares for the trial of Benjamin Sifrit.

5. The State of Maryland is free to charge Defendant with any burglary and theft charges related to the offenses allegedly commited [sic] by Defendant at Hooters Night Club on or about May 31, 2002.

6. If Defendant fails to comply with Paragraphs 2 and 3 of this Memorandum of Understanding, this Memorandum of Understanding becomes null and void (except for Paragraph 1).

Read and approved this 2nd day of June, 2002.

/s/	/s/
Arcangelo M. Tuminelli	Joel J. Todd